

DECISIONS  
OF THE DEPARTMENT OF THE INTERIOR  
IN  
CASES RELATING TO  
THE PUBLIC LANDS

EDITED BY GEORGE J. HESSELMAN

327

VOLUME 39  
JUNE 1, 1910-MARCH 31, 1911

WASHINGTON  
1911



This publication (volumes 1 to 39 and digest covering volumes 1 to 30, inclusive) is held for sale by the Superintendent of Documents, Office of Public Printer, Washington, D. C., to whom all correspondence relating thereto should be addressed.

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# TABLE OF CASES REPORTED.

	Page.		Page.
Adams, Jewett W.....	43	De Rego, Central Pacific R. R.	
Alaska Commercial Company...	597	Co. v.....	288
Allen, Elizabeth.....	224	De Weese v. Henry Investment	
Allen, Pounder v.....	348, 453	Company.....	27
American Smelting and Refin-		Debolt v. Coen.....	16
ing Co.....	299	Deering v. Northern Pacific Ry.	
Amidon v. Hegdale.....	131, 176	Co.....	229
Atlantic and Pacific R. R. Co.,		Denver and Rio Grande R. R.	
Southwestern Oil Co. v.....	335	Co.....	209
Bakersfield Fuel and Oil Co....	460	Diamond, Harris v.....	383
Bauer, Leopold (On Review)...	221, 304	Dingman, Margaret J.....	363
Belknap v. Mulholland.....	433	Donlan, Lawrence.....	353
Bell, Frank G.....	191	Doughty (now Mallory), Crock-	
Big Horn Railroad Co.....	174	ford v.....	60
Bosco, Francis W., et al.....	104, 448	Dunn, v. Hutton.....	451
Briggs, Jones v.....	189	Eitzen v. Moore.....	206
Brooks, Conway et al. v.....	337	Elseth, Heirs of, Kimble v.....	453
Brunson, Zimmerman v.....	310	Fain v. Strunk.....	340
Bruquier, John B.....	446	Fay, Saugstad v.....	160
Burch, Jones v.....	418, 617	Flynn, Patrick.....	593
California, State of.....	158, 174	Fort Davis Military Reservation.	138
California, State of, Kinkade v..	491	Fort McKinney Military Reser-	
Camp Bowie Military Reser-		vation.....	368
vation.....	124	Fox, William R.....	318
Cavasin, State of Minnesota v... 221, 522		Fuller v. Northern Pacific Ry.	
Centerville Mining and Milling		Co.....	69
Co.....	80	Glacier National Park.....	67
Central Pacific R. R. Co., Perry v.	5	Glassner, William.....	462
Central Pacific R. R. Co. v. De		Goebel, G. W.....	571
Rego.....	288	Grenon v. Miller.....	577
Clark, Walter T.....	550	Gunn, Milton S.....	561
Coen, Debolt v.....	16	Hagstrom v. Martell.....	508
Collins, Ted E.....	603	Halvorson, Halvor K.....	456
Conrad, Charles C.....	432	Hamilton, Hiram M.....	76, 607
Continental Tunnel Ry. Co.....	86	Hanley v. Northern Pacific Ry.	
Conway et al. v. Brooks.....	337	Co.....	389
Crockford v. Mallory.....	60	Harris v. Diamond.....	383
Cummings, Thomas A.....	93, 337	Harrison, Elihu C.....	614
Curry v. Vreedenberg.....	488	Hegdale, Amidon v.....	131, 176
Daley, Charlie M. L.....	90	Heirs of Anthony Siankiewicz...	451
Day, Arthur E.....	475	Heirs of Elseth, Kimble v.....	453
De Courcey v. Vandever.....	33		

	Page.		Page.
Heirs of Irwin <i>v.</i> State of Idaho <i>et al.</i> .....	482	Miller, Grenon <i>v.</i> .....	577
Heirs of Knight, Knight <i>v.</i> .....	362, 491	Minnesota, State of, <i>v.</i> Cavin... 221,	522
Hennig, Nellie J. (On Re-review).....	211	Minor, Walter L.....	351
Henry Investment Company, De Weese <i>v.</i> .....	27	Moore, Eitzen <i>v.</i> .....	206
Herman <i>et al.</i> , Stock <i>v.</i> .....	165	Moran, Clara F.....	434
Heywood, Russell A.....	1	Moses, William E.....	417
Holme <i>v.</i> Jankowski <i>et al.</i> .....	225	Mott, Theodore.....	33
Hochler <i>v.</i> Treffry.....	557	Mulholland, Belknap <i>v.</i> .....	433
Hopkins, Thomas <i>v.</i> .....	194	Muller, Esberne K.....	72
Howell, L. C.....	92	Munson <i>v.</i> Johnson.....	127
Hurley, Northern Pacific Ry. Co. <i>v.</i> .....	444	Nauha <i>v.</i> Smallwood.....	465
Hutton, Dunn <i>v.</i> .....	451	Northern Pacific Ry. Co.....	314
Iasigi, Theodore A.....	285	Northern Pacific Ry. Co., Deer- ing <i>v.</i> .....	229
Idaho, State of, Heirs of Irwin <i>v.</i> .....	482	Northern Pacific Ry. Co., Ful- ler <i>v.</i> .....	69
Idaho, State of, Northern Pacific Ry. Co. <i>v.</i> .....	583	Northern Pacific Ry. Co., Han- ley <i>v.</i> .....	359
Idaho, State of, <i>v.</i> Northern Pacific Ry. Co.....	343	Northern Pacific Ry. Co., State of Idaho <i>v.</i> .....	343
Jankowski <i>et al.</i> , Holme <i>v.</i> .....	225	Northern Pacific Ry. Co., State of Washington <i>v.</i> .....	473
Johnson, Clyde H.....	420	Northern Pacific Ry. Co., Toles <i>v.</i> .....	371
Johnson, McKeen <i>v.</i> .....	85	Northern Pacific Ry. Co. <i>v.</i> Hurley.....	444
Johnson, Munson <i>v.</i> .....	127	Northern Pacific Ry. Co. <i>v.</i> State of Idaho <i>et al.</i> .....	583
Johnson, Sam W.....	468	Northwestern Fisheries Com- pany.....	598
Jones <i>v.</i> Briggs.....	189	Oatman, Burtis F.....	604
Jones <i>v.</i> Burch.....	418, 617	Opinions, Attorney - General: (Alaska Coal Lands).....	322
Kean, Anna R.....	554	(Forfeiture Proceedings).....	481
Kimble <i>v.</i> Heirs of Elseth.....	453	(State Selections).....	482
Kinkade <i>v.</i> State of California.....	491	(Temporary Forest Re- serves).....	411, 414
Kirk, Williams <i>v.</i> .....	60	Opinion, Assistant Attorney- General (Alaska Coal Lands).....	327
Klaxta Townsite.....	44	Oregon and California R. R. Co. <i>v.</i> Puckett.....	169
Knight <i>v.</i> Heirs of Knight.....	362, 491	Parkinson, Sanders <i>v.</i> .....	102
Kuntz, John George.....	9	Patry <i>v.</i> Rowe.....	219
Lee, Oliver M.....	538	Pelham, Charles W.....	201
Long, Sarah S.....	297	Perry <i>v.</i> Central Pacific R. R. Co.....	5
Louisiana, State of.....	53	Peterson, Emma S.....	566
Mack, State of Washington <i>v.</i> .....	390	Peterson, Santa Fe Pacific R. R. Co. <i>v.</i> .....	442
Mallory, Crockford <i>v.</i> .....	60	Piau, Alfred R., Jr.....	359, 498
Martell, Hagstrom <i>v.</i> .....	508	Philbrick, Shirley S.....	513
May <i>v.</i> State of Washington.....	377	Pittsburg-Nevada Mining Co....	523
McCaw <i>v.</i> Sorvari.....	64		
McGilvary, Woodman <i>v.</i> .....	574		
McKeen <i>v.</i> Johnson.....	85		
McLean, Fleming.....	580		
McReynolds <i>v.</i> Weckey <i>et al.</i> .....	498		
Mill Side Lode.....	356		
Millard County Land and Water Company.....	480, 481		

## TABLE OF CASES REPORTED.

IX

	Page.		Page.
Pounder <i>v.</i> Allen.....	348, 453	State of Minnesota <i>v.</i> Cavin.....	221, 522
Powel, Ricard L.....	177, 385, 524	State of Washington, May <i>v.</i> .....	377
Puckett, Oregon and California		State of Washington <i>v.</i> Mack.....	390
R. R. Co. <i>v.</i> .....	169	State of Washington <i>v.</i> Northern	
		Pacific Ry. Co.....	473
Rakeman, Matilda M.....	516	State of Wyoming.....	111
Ramona Power and Irrigation		Stirling, Lillie E.....	346
Co.....	309	Stock <i>v.</i> Herman <i>et al.</i> .....	165
Red Lake Indian Lands.....	540	Strunk, Fain <i>v.</i> .....	340
Reynolds, Loring R.....	36	Stump, Alfred M., <i>et al.</i> .....	437
Roberts, W. L.....	166		
Roedde, William F.....	365	Thibedeau, Bridget.....	48
Rosling, Hulda.....	477	Thomas <i>v.</i> Hopkins.....	194
Rowe, Patry <i>v.</i> .....	219	Toles <i>v.</i> Northern Pacific Ry. Co.	
		<i>et al.</i> .....	371
Salisbury, Fanny A.....	471	Townsite of Klaxta.....	44
Sanders <i>v.</i> Parkinson.....	102	Trask, Lizzie.....	279
Santa Fe Pacific R. R. Co..	135, 424, 611	Treffry, Hoobler <i>v.</i> .....	557
Santa Fe Pacific R. R. Co. <i>v.</i>			
Peterson.....	442	Uintah Indian Lands.....	617
Saugstad <i>v.</i> Fay.....	160	United States Mining Co. <i>v.</i>	
Shell, Laurel L.....	502	Wall.....	546
Shouse, Sherman.....	360		
Siankiewicz, Heirs of Anthony..	451	Vandever, DeCoursey <i>v.</i> .....	33
Skagit Power Company.....	89	Vinson, Virinda.....	449
Skinner, W. H., <i>et al.</i> .....	519	Vreedenberg, Curry <i>v.</i> .....	488
Slater, Robert J.....	380		
Sledge, Fishing and Mining Co..	133	Walker, Thomas B.....	64, 426
Smallwood, Nauha <i>v.</i> .....	465	Wall, United States Mining Co. <i>v.</i>	546
Smith <i>v.</i> Whitehead.....	208	Ward, Mary.....	495
Sorvari, McCaw <i>v.</i> .....	64	Washington, State of, May <i>v.</i> .....	377
Southwestern Oil Co. <i>v.</i> Atlantic		Washington, State of, <i>v.</i> Mack..	390
and Pacific R. R. Co.....	335	Washington, State of, <i>v.</i> Northern	
Spencer, Louise H.....	379, 497	Pacific Ry. Co.....	473
Spokane and British Columbia		Weckey <i>et al.</i> , McReynolds <i>v.</i> ....	498
Ry. Co.....	44	Welze, Henry.....	283
State of California.....	158, 174	Westfall, Otto.....	152
State of California, Kinkade <i>v.</i> ..	491	Whitehead, Smith <i>v.</i> .....	208
State of Idaho <i>et al.</i> , Heirs of		Williams, Belle.....	151
Irwin <i>v.</i> .....	482	Williams, Warren W.....	108
State of Idaho <i>et al.</i> , Northern		Williams <i>v.</i> Kirk.....	60
Pacific Ry. Co. <i>v.</i> .....	583	Williston Land Company.....	2
State of Idaho <i>v.</i> Northern Pacific		Woodman <i>v.</i> McGilvary.....	574
Ry. Co.....	343	Wyoming, State of.....	111
State of Louisiana.....	53	Zimmerman <i>v.</i> Brunson.....	310

# TABLE OF CASES CITED.

The abbreviation "L. D." refers to this publication; "B. L. P." to Brainard's Legal Precedents; "1 C. L. L." to Copp's Public Land Laws, Ed. 1875; "2 C. L. L." to Copp's Public Land Laws, Ed. 1882; "C. L. O." to Copp's Land Owner; "C. M. D." to Copp's Mining Decisions; "C. M. L." to Copp's Mineral Lands; "Lester," to Lester's Land Laws and Decisions; "S. M. D." to Sickels's Mining Laws and Decisions; and "C. Cls." to the Court of Claims.

	Page.		Page.
Abold v. Meer, 35 L. D., 560.....	18	Bryars, James A., 34 L. D., 517.....	319
Adams Express Co. v. Denver, etc., R. R. Co., 16 Fed., 712.....	85	Buddicum v. Kirk, 3 Cranch, 293.....	228
Adams v. Farrington, 15 L. D., 234.....	332	Bush v. Leonard, 25 L. D., 129.....	505
Agnew v. Morton, 13 L. D., 228.....	225	California Development Co., 33 L. D., 391.....	296
Alviso v. United States, 8 Wall., 337.....	501	Cameron, David A., 37 L. D., 450.....	611
Anderson, Annie, 1 L. D., 24.....	347	Case v. Kupferschmidt, 30 L. D., 9.....	505
Anderson, John, 13 L. D., 312.....	513	Central Pacific R. R. Co. v. Painter, 6 L. D., 485.....	290
Anderson, John and Peter, 11 L. D., 103.....	513	Carroll v. Stafford, 3 How., 440.....	202
Anderson v. Hillerud, 33 L. D., 335.....	595	Chandler, Lorenzo D., 25 L. D., 205.....	214
Anderson v. Spencer, 38 L. D., 338.....	33	Chapman v. Price, 32 Kan., 446; 4 Pac. Rep., 807.....	363
Anway v. Phinney, 19 L. D., 513.....	192	Chicago Sugar Refining Co. v. Jackson Brewing Co., 48 S. W. Rep., 275.....	228
Apodaca et al. v. Mulligan, 27 L. D., 604.....	138	Chrisinger, R. M., 4 L. D., 609.....	609
Ard v. Brandon, 156 U. S., 537.....	518	Church of Holy Trinity v. United States, 143 U. S., 457.....	63
Aspen Consolidated Mining Co. v. Williams, 27 L. D., 1.....	159	Churchill v. Seeley, 4 L. D., 589.....	162
Austin v. Tawney, L. R. 2 Ch. App., 143.....	227	Clark et al. v. Ervin, 16 L. D., 122.....	313
Aztec Land and Cattle Co. v. Tomlinson, 35 L. D., 161.....	368	Clyde v. Cummings, 101 Pac. Rep., 106.....	526
Baltimore & Ohio R. R. Co. v. Koontz, 104 U. S., 11.....	82	Cobb, Charles H., 31 L. D., 220.....	384
Bank of Augusta v. Earle, 13 Pet., 519.....	81	Cochran v. Dwyer, 9 L. D., 478.....	162, 227
Barden v. Northern Pacific R. R. Co., 154 U. S., 288.....	290	Coffin, Mary E., 34 L. D., 298.....	350
Barker v. Harvey, 181 U. S., 481.....	464, 486	Cole, Alonzo B., 38 L. D., 420.....	264, 286
Barney v. Keokuk, 94 U. S., 324.....	568	Collins v. Hoyt, 31 L. D., 343.....	513
Barnstetter v. Central Pacific R. R. Co. et al., 21 L. D., 464.....	171	Conlin v. Kelly, 12 L. D., 1.....	312
Barringer, Alpheus R., 12 L. D., 623.....	155	Conly v. Price, 9 L. D., 490.....	104, 162
Barry v. Gamble, 3 How., 32.....	417	Continental Tunnel Ry. Co., 39 L. D., 86.....	90
Battlement Reservoir Co., 29 L. D., 112.....	33	Cook, Thomas C., 10 L. D., 324.....	176, 209
Bauer, Leopold, 38 L. D., 460; 39 L. D., 221.....	304	Copper Bullion and Morning Star Lode Min- ing Claims, 35 L. D., 27.....	576
Baughman v. National Water-works Co., 46 Fed., 4.....	82	Cornelius v. Kessel, 128 U. S., 456.....	202
Beaks v. Da Cunha, 126 N. Y., 297.....	227	Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S., 301.....	610
Beckner, Tobias, 6 L. D., 134.....	281	County of Yuba v. Pioneer Gold Mining Co., 32 Fed., 183.....	82
Bellamy v. Cox, 24 L. D., 181.....	281	Crook v. Carroll, 37 L. D., 513.....	166, 217
Bensinger Self-Adding Cash Register Co. v. National Cash Register Co., 42 Fed., 81.....	82	Crow, Jim, 32 L. D., 657.....	512
Bergen, Lizzie, 30 L. D., 258.....	513	Crowley v. Panama R. R. Co., 30 Barb., N. Y., 99.....	83
Bishop, Francis M., 5 L. D., 429.....	227	Cummings, Thomas A., 39 L. D., 93.....	562
Bowes, Anna, 32 L. D., 331.....	293	Dakota Central R. R. Co. v. Downey, 8 L. D., 115.....	33
Boyer v. Northern Pacific R. R. Co., 8 Idaho, 74; 66 Pac., 826.....	83	Dalton v. St. L., M. & S. E. Ry. Co., 113 Mo. App., 71.....	228
Bradford, Seymour K., 36 L. D., 61.....	179	Deary, William, 31 L. D., 19.....	152
Breeding, William, 31 L. D., 80.....	280	Dickerson, John N., 35 L. D., 67.....	103, 434
Bright, James F., 6 L. D., 602.....	419	Dinan, James, 35 L. D., 102.....	37
Brunette v. Phillips, 22 L. D., 692.....	332	Doll v. Jones, 34 L. D., 82.....	501
Bryant v. Begley, 23 L. D., 188.....	281		
Bryant v. Gill et al., 29 L. D., 68.....	513		

## TABLE OF CASES CITED.

XI

	Page.		Page.
Dollar Savings Bank v. United States, 19 Wall., 227.....	487	Hook v. Preston, 21 L. D., 374.....	490
Dotson, Richard, 13 L. D., 275.....	551	Hookstra, Henry, 34 L. D., 690.....	38
Dower v. Richards, 151 U. S., 658.....	358	Horne v. Smith, 159 U. S., 40.....	569
Drake, John P., 11 L. D., 574.....	162	Howard, Thomas, 3 L. D., 409.....	162, 227
Dubuque & Pacific R. R. Co., v. Litchfield, 23 How., 66.....	487	Hoyt v. Sullivan, 2 L. D., 283.....	227
Dunluce Placer Mine, 6 L. D., 761.....	313	Hyde v. Shine, 199 U. S., 62.....	66, 430, 610
Dyar v. Jones, 35 L. D., 499.....	220	Igo Bridge Extension Placer, 38 L. D., 281..	461
Elder, Katharine O., 30 L. D., 21.....	74	Iowa v. Illinois, 147 U. S., 1.....	59
Elliott v. East Pa. R. R. Co., 99 U. S., 573..	326	Iron Silver Mining Co. v. Campbell, 135 U. S., 286.....	358
Elliott v. Noel, 4 L. D., 73.....	162	Irwin Heirs v. State of Idaho, 38 L. D., 219.....	281, 344, 584
Esperson, Niels, 21 L. D., 271.....	513	Irwin Heirs v. State of Idaho, 39 L. D., 482..	584
Farmers Loan & Trust Co. v. Chicago & Alton R. R. Co., 27 L. D., 146.....	82	James v. St. Louis, etc., R. R. Co., 46 Fed., 47.....	83
Farrell v. McDonnell, 13 L. D., 105.....	104	James v. Stanley, 37 L. D., 560.....	217, 342
Ferrell <i>et al.</i> v. Hoge <i>et al.</i> , 29 L. D., 12.....	300	Jenkins, Ed., 37 L. D., 434.....	75
Felix v. Patrick, 145 U. S., 317.....	490, 556	Jenkins, Williford, 29 L. D., 510.....	444
Filli v. Delaware, L. & W. R. R. Co., 37 Fed., 65.....	82	Johnson v. Towsley, 13 Wall., 72.....	282
Filter, F. M., 38 L. D., 34.....	332	K. B. Co. v. Batie, 25 Ohio C. C., 486.....	228
Ford, Henry, 12 L. D., 181.....	512	Keane v. Brygger, 160 U. S., 276.....	220
Forward, James A., 8 L. D., 528.....	220	Kern Oil Co. <i>et al.</i> v. Clarke, 31 L. D., 288..	384
Frank v. Corliss Heirs, 27 L. D., 510.....	455	Kilpatrick, William D., 38 L. D., 234.....	443
French-Glenn Live Stock Co. v. Springer, 185 U. S., 47.....	570	King <i>et al.</i> v. Bradford, 31 L. D., 108.....	313
Frost, James M., <i>et al.</i> , 18 L. D., 145.....	220	Kinsinger v. Peck, 11 L. D., 202.....	162
Frost v. Wenie, 157 U. S., 46.....	487	Kirk v. Hamilton, 102 U. S., 68.....	490
Furnas, Leroy W., 38 L. D., 194.....	520	Kirwan v. Murphy, 189 U. S., 35.....	570
Galliher v. Cadwell, 145 U. S., 368.....	490	Knight v. United States Land Association, 142 U. S., 161.....	216, 307, 501
Gariss v. Borin, 21 L. D., 542.....	162, 227	Kuhn, Anna V., 37 L. D., 437.....	75
Gilbert, Frederick L., <i>et al.</i> , 35 L. D., 422..	208	La Friend v. N. Y. C. & H. R. R. Co., 19 NY. Supp., 665.....	228
Gillfillan v. McKee, 159 U. S., 303.....	501	Lafayette Insurance Co. v. French, 18 How., 404.....	82
Gilson Asphaltum Co., 33 L. D., 612.....	524	Lamb v. Davenport, 18 Wall., 307.....	518
Gormley, Francis, 20 L. D., 450.....	360	Lammers v. Nissen, 4 Neb. Rep., 245.....	569
Gosney, E. S., 30 L. D., 44.....	280	Lattig v. Scott <i>et al.</i> , 107 Pac. Rep., 47.....	567
Grand Rapids and Indiana R. R. Co. v. Butler, 159 U. S., 87.....	568	Laughlin, Allen, 31 L. D., 256.....	110
Graves v. Hawley, 50 Fed. Rep., 319.....	228	Leaming v. McKenna, 31 L. D., 318.....	384
Green, Web, 38 L. D., 586.....	35	Leavenworth, Lawrence and Galveston R. R. Co. v. United States, 92 U. S., 733..	290
Green v. Hayes, 11 Pac., 716; 7 Cal., 276.....	78	Lee, Anna, 24 L. D., 531.....	220
Gribble v. Ballinger, 33 D. C. Ap., 211.....	95	Leinen, George, 8 L. D., 233.....	62
Ground Hog Lode v. Parole and Morning Star, 8 L. D., 430.....	62	Lemmon, George E., 36 L. D., 417.....	94, 551
Guthrie Townsite v. Paine <i>et al.</i> , 13 L. D., 562.....	368	Lewis v. Lichty, 3 Wash., 43; 28 Pac. Rep., 356.....	363
Gwillim v. Donnellan, 115 U. S., 45.....	524	Libolt v. Snider, 35 L. D., 430.....	18
Hagerty, James A., 35 L. D., 252.....	75	Lidgett, Fred, 35 L. D., 371.....	75
Haldane v. United States, 69 Fed. Rep., 819..	228	Litchfield <i>et al.</i> v. Anderson, 32 L. D., 298.....	385
Hamilton, Hiram M., 39 L. D., 76.....	429	Long, Sarah S., 39 L. D., 297.....	503
Handly v. Anthony, 5 Wheat., 374.....	59	Louisiana v. Mississippi, 202 U. S., 1.....	60
Harris, James G., 28 L. D., 90.....	95	MacNamara, Cornelius J., 33 L. D., 520....	94, 598
Hauser, Amy, <i>et al.</i> , 13 L. D., 185; 20 L. D., 46.....	512	McCornack, John K., 32 L. D., 578.....	609
Hawley v. Diller, 178 U. S., 476.....	610	McCourt, James, 33 L. D., 386.....	281
Heirs of Irwin v. State of Idaho, 38 L. D., 219.....	281, 344, 482	McDermott v. Board of Police, etc., 25 Barb., 635.....	227
Heirs of Stevenson v. Cunningham, 32 L. D., 650.....	282, 455	McDonald v. Jaramilla, 10 L. D., 276.....	231
Hobson, Simeon S., 29 L. D., 453.....	260	McFarland v. State of Idaho, 32 L. D., 107..	345
Hodge, Truman L., 9 L. D., 26.....	155	McGlenn v. Wienbroer, 15 L. D., 370.....	312
Homestead and Timber Land Claimants v. State of Washington, 36 L. D., 89.....	391, 474	McGlothlin, E. N., 36 L. D., 502.....	75
		McKibben v. Gable, 34 L. D., 178.....	339
		Mann, Jane, 18 L. D., 116.....	595
		Marburg Lode Mining Claim, 30 L. D., 202..	333, 575

	Page.		Page.
Martin, Pochontas, 29 L. D., 185.....	347	Reins v. Montana Copper Co., 29 L. D., 461..	490
Menasha Woodenware Co., 37 L. D., 329.....	326, 332, 442	Ritter, E. J., <i>et al.</i> , 37 L. D., 715.....	576
Meyer v. Brown, 15 L. D., 307.....	162, 227	Robinson <i>et al.</i> v. Lundrigan, 178 Fed. Rep., 230.....	208
Meyers v. Massey, 22 L. D., 159.....	434	Routh, Jennie, 13 L. D., 601.....	364
Miller v. Chrisman, 140 Cal., 440; 197 U. S., 313.....	462	Russian-American Packing Co. v. United States, 199 U. S., 570.....	598
Miller <i>et al.</i> v. Wheeler & Wilson Mfg. Co., 46 Fed., 882.....	82	St. John, Alice C., 38 L. D., 577.....	164
Milne v. Dowling, 4 L. D., 378.....	162	St. Louis v. Rutz, 138 U. S., 226.....	568
Moon, James L., 13 L. D., 614.....	133	St. Louis & S. F. R. R. Co. v. James, 161 U. S., 545.....	84
Moran v. Horsky, 178 U. S., 205.....	489	St. Louis v. Wiggins Ferry Co., 11 Wall., 423.....	82
Mouso, Charles D., 22 L. D., 42.....	216	St. Paul, Minneapolis and Manitoba Ry. Co. v. Donohue, 210 U. S., 21.....	281, 475
Muller, Esberne K., 39 L. D., 72.....	225, 361	Salsberry, Carroll, 17 L. D., 170.....	95
Mullery, John C., <i>et al.</i> , 34 L. D., 333.....	110, 443	Santa Fe Pacific Ry. Co. v. Ranklev, 34 L. D., 380.....	490
Myers <i>et al.</i> v. Murray, Nelson & Co., 43 Fed., 695.....	82	Saugstad v. Fay, 39 L. D., 160.....	229
National Typographic Co. v. New York Typographic Co., 44 Fed., 711.....	82	Schmitz, Winifred S., 38 L. D., 587.....	283
Needham v. Northern Pacific R. R. Co., 26 L. D., 444.....	368	Schollenberger, <i>In re</i> , 96 U. S., 369.....	82
Nelson v. Northern Pacific Ry. Co., 188 U. S., 108.....	7, 475	Schulenberg v. Harriman, 21 Wall., 63.....	46
Niles v. Cedar Point Club, 175 U. S., 300.....	570	Selway v. Flynn, 6 L. D., 541.....	259
Norman Townsite v. Blakeney, 13 L. D., 399.....	368	Sharp, Fidelo C., 35 L. D., 164.....	444
Norman v. Phoenix Zinc & Smelting Co., 28 L. D., 361.....	228	Shaw v. Quincy Mining Co., 145 U. S., 444.....	82
North Perry Townsite v. Linn, 26 L. D., 393.....	368	Shaw v. Russell, 38 L. D., 275.....	350
Northern Pacific R. R. Co. v. Kerry, 10 L. D., 290.....	290	Sheppard, Robert L., 32 L. D., 474.....	571
Northern Pacific Ry. Co. v. Loeber, 38 L. D., 217.....	290	Shively v. Bowlby, 152 U. S., 1.....	568
Northern Pacific Ry. Co. v. State of Idaho, 37 L. D., 68.....	584	Sierra Lumber Company, 30 L. D., 547.....	213
Olsen, Ole B., 33 L. D., 225.....	551	Sinnott v. Jewett, 33 L. D., 91.....	550
Opinion, Atty. Gen., 38 L. D., 224.....	344, 482	Skagit Power Co., 39 L. D., 89.....	209
Oregon & California R. R. Co. v. Barrett, 12 L. D., 232.....	290	Slusher, William M., 38 L. D., 326.....	319
Oregon & California R. R. Co. v. Croy, 30 L. D., 241.....	6	Smith, Joshua L., 31 L. D., 57.....	280
Osgood, Edwin P., 38 L. D., 374.....	572	Smith v. Custer <i>et al.</i> , 8 L. D., 269.....	609
Overman, Levy, 35 L. D., 613.....	17	Snow Flake Fraction Placer, 37 L. D., 250.....	302
Owens, Adrian B., 2 C. P. L. L. (1890), 1238.....	145	South Dakota v. Thomas, 35 L. D., 171.....	282
Pacific Coast Marble Co. v. Northern Pacific R. R. Co. <i>et al.</i> , 25 L. D., 233.....	312	Southern Pacific R. R. Co., 32 L. D., 51.....	346
Parker v. Castle, 4 L. D., 84.....	162	Staples v. St. Paul & Northern Pacific Ry. Co., 25 L. D., 294.....	161
Pederson v. Parkinson, 37 L. D., 522.....	254	Starkey, Orlando, 7 L. D., 385.....	220
People v. Cook, 14 Barb., 259.....	325	Stewart v. Peterson, 28 L. D., 515.....	611
People, <i>ex rel.</i> v. The L. & B. R. R. Co., 13 Barb., 211.....	227	Stock v. Herman <i>et al.</i> , 39 L. D., 165.....	217
Perkins v. Central Pacific R. R. Co., 1 L. D., 336.....	290	Sturr v. Beck, 133 U. S., 541.....	281
Perry v. Central Pacific R. R. Co., 39 L. D., 5.....	475	Tarpey v. Madsen, 178 U. S., 215.....	6, 518
Peter Schoenhofen Brewing Co., 8 Pa. Super. Ct., 141.....	83	Tauer v. Heirs of Mann, 4 L. D., 433.....	282
Phillips v. Breazeale's Heirs, 19 L. D., 573.....	95	Teller, John C., 26 L. D., 484.....	576
Pike, Emma H., 32 L. D., 395.....	380	Tendick, John S., 37 L. D., 332.....	477
Polzin, August, 8 L. D., 84.....	155	Texas v. Snyder, 66 Tex., 687.....	326
Pope, Hamilton, 28 L. D., 402.....	33	Thornton, George F., 38 L. D., 371.....	446
Porter v. Carlile, 34 L. D., 361.....	332	Thorpe <i>et al.</i> v. State of Idaho, 36 L. D., 479.....	584
Power, T. C., & Bro., 33 L. D., 152.....	259	Todd v. Daniel, 16 Peters, 521.....	501
Premo, George, 9 L. D., 70.....	162, 227	Todd v. State of Washington, 38 L. D., 165, 518.....	392, 474
Pueblo of San Francisco, 5 L. D., 483.....	501	Turnbull v. Roosevelt Townsite, 34 L. D., 94.....	368
Quien v. Lewis, 20 L. D., 319.....	74	Union Pacific R. R. Co. v. Harris, 215 U. S., 386.....	485
		United States Mining Co. v. Lawson <i>et al.</i> , 134 Fed. Rep., 769; 207 U. S., 1.....	547
		United States v. Alger, 152 U. S., 384.....	227
		United States v. Bagnell Timber Co., 178 Fed. Rep., 795.....	230
		United States v. Basic Co., 121 Fed. Rep., 504.....	82
		United States v. Blendaur, 128 Fed. Rep., 910.....	485

	Page.		Page.
United States <i>v.</i> Bradford, 148 U. S., 413...	216	Walker, Henry, 25 L. D., 119.....	214
United States <i>v.</i> Budd, 144 U. S., 154.....	580	Walker, Thomas B., 39 L. D., 64.....	427
United States <i>v.</i> Chandler-Dunbar Co., 209 U. S., 447.....	569	Walker <i>v.</i> Lexington Townsite, 13 L. D., 404.....	368
United States <i>v.</i> Copper Queen Mining Co., 60 Pac., 885.....	82	Wangenheim, Emil S., 28 L. D., 291.....	319
United States <i>v.</i> Detroit Lumber Co., 200 U. S., 321.....	78	Ward, Elizabeth C., 21 L. D., 287.....	155
United States <i>v.</i> Graham, 110 U. S., 219....	227	Waterhouse <i>v.</i> Scott, 13 L. D., 718.....	63
United States <i>v.</i> Haggin, 12 L. D., 34.....	332	Webster <i>v.</i> Luther, 163 U. S., 331.....	94, 227
United States <i>v.</i> Herron, 20 Wall., 251.....	487	Weed, Thurlow, 8 L. D., 100.....	220
United States <i>v.</i> Hyde, 174 Fed. Rep., 175....	78, 430	Weisbeck <i>v.</i> McGee, 36 L. D., 247.....	163
United States <i>v.</i> Marshall Mining Co., 129 U. S., 579.....	490	Whitaker, George S., 32 L. D., 329.....	571
United States <i>v.</i> McLaughlin, 127 U. S., 428.	425	Whitaker <i>v.</i> McBride, 197 U. S., 510.....	569
United States <i>v.</i> Mission Rock Co., 189 U. S., 391.....	568	Whitney, Peter, 38 L. D., 332.....	540
United States <i>v.</i> Rhea, 8 L. D., 578.....	104	Wilcox <i>v.</i> McConnel, 13 Pet., 493.....	413
United States <i>v.</i> Texas, 162 U. S., 1.....	59	Wilkinson <i>v.</i> Delaware, etc., R. R. Co., 22 Fed Rep., 353.....	83
United States <i>v.</i> The Dalles Military Road <i>et al.</i> , 41 Fed. Rep., 493.....	216	Williams <i>v.</i> United States, 138 U. S., 514... 216, 307	
United States <i>v.</i> Throckmorton, 98 U. S., 61.	490	Williston Land Company, 37 L. D., 428....	3
United States <i>v.</i> Trinidad Coal and Coke Co., 137 U. S., 100.....	326	Williston Land Company, 39 L. D., 2.....	51
United States <i>v.</i> Tygh Valley Land and Livestock Co., 76 Fed. Rep., 693.....	526	Wilson, John B., 27 L. D., 316.....	33
Uphoff <i>v.</i> Chicago, etc., R. R. Co., 22 Fed. Cases, 13185.....	83	Wilson <i>v.</i> Heirs of Smith, 37 L. D., 519....	224
Utah, State of, 32 L. D., 117.....	159	Wink, Arnold, 31 L. D., 47.....	280
Valley, Josephine, <i>et al.</i> , 19 L. D., 329....	513	Winona and St. Peter R. R. Co. <i>v.</i> United States, 165 U. S., 483.....	78
Van Brocklin <i>v.</i> Tennessee, 117 U. S., 151..	485	Wisconsin Central R. R. Co. <i>v.</i> Forsythe, 159 U. S., 46.....	305
Vidal <i>v.</i> Bennis, 22 L. D., 124.....	419	Witherspoon <i>v.</i> Duncan, 4 Wall, 210.....	202
Virginia <i>v.</i> Tennessee, 148 U. S., 503.....	59	Wolsey <i>v.</i> Chapman, 101 U. S., 755.....	413
		Wolters, Charles, 8 L. D., 131.....	220
		Wood <i>v.</i> Beach, 156 U. S., 548.....	413
		Wooldridge, William M., 33 L. D., 525....	94
		Wright <i>v.</i> Francis, 36 L. D., 499.....	380
		Yard, H. H., <i>et al.</i> , 38 L. D., 59.....	461

## TABLE OF OVERRULED AND MODIFIED CASES.

[Volumes 1 to 39 inclusive.]

[Cases marked with a star (\*) are now authority.]

Alaska Copper Company (32 L. D., 128); overruled in part, 37 L. D., 674.	Bartch <i>v.</i> Kennedy (3 L. D., 437); modified, 6 L. D., 217.
Aldrich <i>v.</i> Anderson (2 L. D., 71); overruled, 15 L. D., 201.	Bennett, Peter W. (6 L. D., 672); overruled, 29 L. D., 565.
Americus <i>v.</i> Hall (29 L. D., 677); vacated, 30 L. D., 388.	Bivins <i>v.</i> Shelley (2 L. D., 282); modified, 4 L. D., 583.
*Anderson, Andrew, <i>et al.</i> (1 L. D., 1); overruled, 34 L. D., 606. (See 36 L. D., 14.)	*Black, L. C. (3 L. D., 101); overruled, 34 L. D., 606. (See 36 L. D., 14.)
Anderson <i>v.</i> Tannehill <i>et al.</i> (10 L. D., 388); overruled, 13 L. D., 586.	Blenkner <i>v.</i> Sloggy (2 L. D., 267); modified, 6 L. D., 217.
Atlantic and Pacific R. R. Co. (5 L. D., 269); overruled, 27 L. D., 241.	Bosch, Gottlieb (8 L. D., 45); overruled, 13 L. D., 42.
*Auerbach, Samuel H., <i>et al.</i> (29 L. D., 208); overruled, 36 L. D., 36. (See 37 L. D., 715.)	Box <i>v.</i> Ulstein (3 L. D., 143); modified, 6 L. D., 217.
Baca Float No. Three (5 L. D., 705; 12 L. D., 676; 13 L. D., 624); vacated, 29 L. D., 44.	Bradford, J. L. (31 L. D., 132); overruled, 35 L. D., 399.
Bailey, John W., <i>et al.</i> (3 L. D., 386); modified, 5 L. D., 513.	Bradstreet <i>et al.</i> <i>v.</i> Rhem (21 L. D., 30); reversed, <i>id.</i> , 544.
*Baker <i>v.</i> Hurst (7 L. D., 457); overruled, 8 L. D., 110. (See 9 L. D., 360.)	Brady <i>v.</i> Southern Pacific R. R. Co. (5 L. D., 407 and 658); overruled, 20 L. D., 259.
Barbour <i>v.</i> Wilson <i>et al.</i> (23 L. D., 462); vacated, 28 L. D., 62.	Brick Pomeroy Mill Site (34 L. D., 320); overruled, 37 L. D., 674.
Barbut, James (9 L. D., 514); overruled, 29 L. D., 698.	*Brown, Joseph T. (21 L. D., 47); overruled, 31 L. D., 222. (See 35 L. D., 399.)
Barlow, S. L. M. (5 L. D., 695); modified, 6 L. D., 648.	Brown <i>v.</i> Cagle (30 L. D., 8); vacated, 30 L. D., 148.
	Bundy <i>v.</i> Livingston (1 L. D., 152); overruled, 6 L. D., 284.
	Burkholder <i>v.</i> Skagen (4 L. D., 166); overruled, 9 L. D., 153.

- Buttery v. Sprout* (2 L. D., 293); overruled, 5 L. D., 591.
- Cagle v. Mendenhall* (20 L. D., 447); overruled, 23 L. D., 533.
- Cain et al. v. Addenda Mining Co.* (24 L. D., 18); vacated, 29 L. D., 62.
- California and Oregon Land Co.* (21 L. D., 344); overruled, 26 L. D., 453.
- California, State of* (14 L. D., 253); vacated, 23 L. D., 230.
- California, State of* (15 L. D., 10); overruled, 23 L. D., 423.
- California, State of* (19 L. D., 585); vacated, 28 L. D., 57.
- California, State of* (22 L. D., 428); overruled, 32 L. D., 34.
- California, State of, v. Moccettini* (19 L. D., 359); overruled, 31 L. D., 335.
- California, State of, v. Pierce* (9 C. L. O., 118); modified, 2 L. D., 854.
- California, State of, v. Smith* (5 L. D., 543); overruled, 18 L. D., 343.
- Call v. Swain* (3 L. D., 46); overruled, 18 L. D., 373.
- Cameron Lode* (13 L. D., 369); overruled, 25 L. D., 518.
- Camplan v. Northern Pacific R. R. Co.* (28 L. D., 118); overruled, 29 L. D., 550.
- Case v. Church* (17 L. D., 578); overruled, 26 L. D., 453.
- Castello v. Bonnie* (20 L. D., 311); overruled, 22 L. D., 174.
- Cawood v. Dumas* (22 L. D., 585); vacated, 25 L. D., 526.
- Central Pacific R. R. Co. v. Orr* (2 L. D., 525); overruled, 11 L. D., 445.
- Chappell v. Clark* (27 L. D., 334); modified, 27 L. D., 532.
- Childress et al. v. Smith* (15 L. D., 89); overruled, 26 L. D., 453.
- Christofferson, Peter* (3 L. D., 329); modified, 6 L. D., 284, 624.
- Clafin v. Thompson* (28 L. D., 279); overruled, 29 L. D., 693.
- Cochran v. Dwyer* (9 L. D., 478); see 39 L. D., 162, 225.
- Colorado, State of* (7 L. D., 490); overruled, 9 L. D., 408.
- Cook, Thomas C.* (10 L. D., 324); see 39 L. D., 162, 225.
- Cooper, John W.* (15 L. D., 285); overruled, 25 L. D., 113.
- Copper Bullion and Morning Star Lode Mining Claims* (35 L. D., 27); see 39 L. D., 574.
- Corlis v. Northern Pacific R. R. Co.* (23 L. D., 265); vacated, 26 L. D., 652.
- Cornell v. Chilton* (1 L. D., 153); overruled, 6 L. D., 483.
- Cowles v. Huff* (24 L. D., 81); modified, 28 L. D., 515.
- Cox, Allen H.* (30 L. D., 90, 468); vacated, 31 L. D., 114.
- Crowston v. Seal* (5 L. D., 213); overruled, 18 L. D., 586.
- Culligan v. State of Minnesota* (34 L. D., 22); modified, 34 L. D., 151.
- Dakota Central R. R. Co. v. Downey* (8 L. D., 115); modified, 20 L. D., 131.
- Dennison & Willits* (11 C. L. O., 261); overruled, 26 L. D., 123.
- Devoe, Lizzie A.* (5 L. D., 4); modified, 5 L. D., 429.
- Dickey, Ella I.* (22 L. D., 351); overruled, 32 L. D., 331.
- Dowman v. Moss* (19 L. D., 526); overruled, 25 L. D., 82.
- Dudymott v. Kansas Pacific R. R. Co.* (5 C. L. O., 69); overruled, 1 L. D., 345.
- Dunphy, Elijah M.* (8 L. D., 102); overruled, 36 L. D., 561.
- Dysart, Francis J.* (23 L. D., 282); modified, 25 L. D., 188.
- Easton, Francis E.* (27 L. D., 600); overruled, 30 L. D., 355.
- \*Elliott v. Ryan* (7 L. D., 322); overruled, 8 L. D., 110. (See 9 L. D., 360.)
- Emblen v. Weed* (16 L. D., 28); overruled, 17 L. D., 220.
- Epley v. Trick* (8 L. D., 110); overruled, 9 L. D., 360.
- Erhardt, Finsans* (36 L. D., 154); overruled, 38 L. D., 406.
- Ewing v. Rickard* (1 L. D., 146); overruled, 6 L. D., 483.
- Falconer v. Price* (19 L. D., 167); overruled, 24 L. D., 264.
- Ferrell et al. v. Hoge et al.* (18 L. D., 81); overruled, 25 L. D., 351.
- Fette v. Christiansen* (29 L. D., 710); overruled, 34 L. D., 167.
- Fish, Mary* (10 L. D., 606); modified, 13 L. D., 511.
- Fitch v. Sioux City and Pacific R. R. Co.* (216 L. and R., 184); overruled, 17 L. D., 43.
- Fleming v. Bowe* (13 L. D., 78); overruled, 23 L. D., 175.
- Florida Mesa Ditch Co.* (14 L. D., 265); overruled, 27 L. D., 421.
- Florida Railway and Navigation Co. v. Miller* (3 L. D., 324); modified, 6 L. D., 716; overruled, 9 L. D., 237.
- Florida, State of* (17 L. D., 355); reversed, 19 L. D., 76.
- Forgeot, Margaret* (7 L. D., 280); overruled, 10 L. D., 623.
- Fort Boise Hay Reservation* (6 L. D., 16); overruled, 27 L. D., 505.
- Freeman v. Texas Pacific R. R. Co.* (2 L. D., 550); overruled, 7 L. D., 18.
- Gallihier, Marie* (8 C. L. O., 57); overruled, 1 L. D., 17.
- Gariss v. Borin* (21 L. D., 542); see 39 L. D., 162, 225.
- Garrett, Joshua* (2 C. L. O., 1005); overruled, 5 L. D., 158.
- Gates v. California and Oregon R. R. Co.* (5 C. L. O., 150); overruled, 1 L. D., 336.
- Gauger, Henry* (10 L. D., 221); overruled, 24 L. D., 81.
- Gohrman v. Ford* (8 C. L. O., 6); overruled, 4 L. D., 580.
- Golden Chief "A" Placer Claim* (35 L. D., 557); modified, 37 L. D., 250.
- Goldstein v. Juneau Townsite* (23 L. D., 417); vacated, 31 L. D., 88.



- Gotebo Townsite v. Jones (35 L. D., 18); modified, 37 L. D., 560.
- Gowdy v. Connell (27 L. D., 56); vacated, 28 L. D., 240.
- Gowdy v. Gilbert (19 L. D., 17); overruled, 26 L. D., 453.
- Gowdy *et al.* v. Kismet Gold Mining Co. (22 L. D., 624); modified, 24 L. D., 191.
- Grampian Lode (1 L. D., 544); overruled 25 L. D., 495.
- Gregg *et al.* v. State of Colorado (15 L. D., 151); modified, 30 L. D., 310.
- Grinnell v. Southern Pacific R. R. Co. (22 L. D., 438); vacated, 23 L. D., 489.
- Ground Hog Lode v. Parole and Morning Star Lodes (8 L. D., 430); overruled, 34 L. D., 568.
- Gulf and Ship Island R. R. Co. (16 L. D., 236); modified 19 L. D., 534.
- Hansbrough, Henry C. (5 L. D., 155); overruled, 29 L. D., 59.
- Hardee, D. C. (7 L. D., 1); overruled, 29 L. D., 698.
- Hardee v. United States (8 L. D., 391; 16 L. D., 499); overruled, 29 L. D., 698.
- Hardin, James A. (10 L. D., 313); revoked, 14 L. D., 233.
- Harris, James G. (28 L. D., 90); overruled, 39 L. D., 93.
- Harrison, Luther (4 L. D., 179); overruled, 17 L. D., 216.
- Harrison, W. R. (19 L. D., 299); overruled, 33 L. D., 539.
- Hastings and Dakota Ry. Co. v. Christenson *et al.* (22 L. D., 257); overruled, 28 L. D., 572.
- Hayden v. Jamison (24 L. D., 403); vacated, 26 L. D., 373.
- Heilman v. Syverson (15 L. D., 184); overruled, 23 L. D., 119.
- Heinzman *et al.* v. Letroadee's Heirs *et al.* (28 L. D., 497); overruled, 38 L. D., 253.
- Hennig, Nellie J. (38 L. D., 443, 445); recalled and vacated, 39 L. D., 211.
- Herrick, Wallace H. (24 L. D., 23); overruled, 25 L. D., 113.
- Hickey, M. A., *et al.* (3 L. D., 83); modified, 5 L. D., 256.
- Holden, Thomas A. (16 L. D., 493); overruled, 29 L. D., 166.
- Holland, G. W. (6 L. D., 20); overruled, 6 L. D., 639; 12 L. D., 436.
- Hooper, Henry (6 L. D., 624); modified, 9 L. D., 86, 284.
- Howard, Thomas (3 L. D., 409); see 39 L. D., 162, 225.
- Howard v. Northern Pacific R. R. Co. (23 L. D., 6); overruled, 28 L. D., 126.
- Howell, John H. (24 L. D., 35); overruled, 28 L. D., 204.
- Howell, L. C. (39 L. D., 92); see 39 L. D., 411.
- Hull *et al.* v. Ingle (24 L. D., 214); overruled, 30 L. D., 258.
- Huls, Clara (9 L. D., 401); modified, 21 L. D., 377.
- Hyde, F. A., *et al.* (27 L. D., 472); vacated, 28 L. D., 284.
- Hyde *et al.* v. Warren *et al.* (14 L. D., 576); see 19 L. D., 64.
- Inman v. Northern Pacific R. R. Co. (24 L. D., 318); overruled, 28 L. D., 95.
- Iowa Railroad Land Company (23 L. D., 79; 24 L. D., 125); vacated, 29 L. D., 79.
- Jacks v. Belard *et al.* (29 L. D., 369); vacated, 30 L. D., 345.
- Jones, James A. (3 L. D., 176); overruled, 8 L. D., 448.
- Jones v. Kennett (6 L. D., 688); overruled, 14 L. D., 429.
- Kackmann, Peter (1 L. D., 86); overruled, 16 L. D., 464.
- Kemper v. St. Paul and Pacific R. R. Co. (2 C. L. L., 805); overruled, 18 L. D., 101.
- King v. Eastern Oregon Land Co. (23 L. D., 579); modified, 30 L. D., 19.
- Kinsinger v. Peck (11 L. D., 202); see 39 L. D., 162, 225.
- Kiser v. Keech (7 L. D., 25); overruled, 23 L. D., 119.
- Knight, Albert B., *et al.* (30 L. D., 227); overruled, 31 L. D., 64.
- Kniskern v. Hastings and Dakota Ry. Co. (6 C. L. O., 50); overruled, 1 L. D., 362.
- Krigbaum, James T. (12 L. D., 617); overruled, 26 L. D., 448.
- Lackawanna Placer Claim (36 L. D., 36); overruled, 37 L. D., 715.
- Lamb v. Ullery (10 L. D., 528); overruled, 32 L. D., 331.
- Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C. L. O., 10); overruled, 14 L. D., 278.
- Las Vegas Grant (13 L. D., 646; 15 L. D., 58); revoked, 27 L. D., 683.
- Laughlin v. Martin (18 L. D., 112); modified, 21 L. D., 40.
- Lemmons, Lawson H. (19 L. D., 37); overruled, 26 L. D., 389.
- Leonard, Sarah (1 L. D., 41); overruled, 16 L. D., 464.
- Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299.
- Linderman v. Wait (6 L. D., 689); overruled, 13 L. D., 459.
- Little Pet Lode (4 L. D., 17); overruled, 25 L. D., 550.
- Lock Lode (6 L. D., 105); overruled, 26 L. D., 123.
- Lockwood, Francis A. (20 L. D., 361); modified, 21 L. D., 200.
- Loneragan v. Shockley (33 L. D., 238); overruled, 34 L. D., 314; 36 L. D., 199.
- Louisiana, State of (8 L. D., 126); modified, 9 L. D., 157.
- Louisiana, State of (24 L. D., 231); vacated, 26 L. D., 5.
- Lucy B. Hussey Lode (5 L. D., 93); overruled, 25 L. D., 495.
- Luton, James W. (34 L. D., 468); overruled, 35 L. D., 102.
- Lynch, Patrick (7 L. D., 33); overruled, 13 L. D., 713.
- Madigan, Thomas (8 L. D., 188); overruled, 27 L. D., 448.
- Maginnis, Charles P. (31 L. D., 222); overruled, 35 L. D., 399.
- Makemson v. Snider's Heirs (22 L. D., 511); overruled, 32 L. D., 650.

- Mason *v.* Cromwell (24 L. D., 248); vacated, 26 L. D., 369.
- Masten, E. C. (22 L. D., 337); overruled, 25 L. D., 111.
- Mather *et al. v.* Hackley's Heirs (15 L. D., 487); vacated, 19 L. D., 48.
- Maughan, George W. (1 L. D., 25); overruled, 7 L. D., 94.
- McCalla *v.* Acker (29 L. D., 203); vacated, 30 L. D., 277.
- McDonald, Roy, *et al.* (34 L. D., 21); overruled, 37 L. D., 285.
- \*McDonogh School Fund (11 L. D., 378); overruled, 30 L. D., 616. (See 35 L. D., 399.)
- McFadden *et al. v.* Mountain View Mining and Milling Co. (26 L. D., 530); vacated, 27 L. D., 358.
- McGee, Edward D. (17 L. D., 285); overruled, 29 L. D., 166.
- McGrann, Owen (5 L. D., 10); overruled, 24 L. D., 502.
- McGregor, Carl (37 L. D., 693); overruled, 38 L. D., 148.
- McKernan *v.* Bailey (16 L. D., 368); overruled, 17 L. D., 494.
- McNamara *et al. v.* State of California (17 L. D., 296); overruled, 22 L. D., 666.
- McPeck *v.* Sullivan *et al.* (25 L. D., 281); overruled, 36 L. D., 26.
- Mercer *v.* Buford Townsite (35 L. D., 119); overruled, 35 L. D., 649.
- Meyer, Peter (6 L. D., 639); modified, 12 L. D., 436.
- Meyer *v.* Brown (15 L. D., 307); see 39 L. D., 162, 225.
- Miller *v.* Sebastian (19 L. D., 288); overruled, 26 L. D., 448.
- Milton *et al. v.* Lamb (22 L. D., 339); overruled, 25 L. D., 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D., 79); overruled, 29 L. D., 112.
- Miner *v.* Mariott *et al.* (2 L. D., 709); modified, 28 L. D., 224.
- Monitor Lode (18 L. D., 358); overruled, 25 L. D., 495.
- Moore, Charles H. (16 L. D., 204); overruled, 27 L. D., 482.
- Morgan *v.* Craig (10 C. L. O., 234); overruled, 5 L. D., 303.
- Morgan *v.* Rowland (37 L. D., 90); overruled, 37 L. D., 618.
- Moritz *v.* Hinz (36 L. D., 450); vacated, 37 L. D., 382.
- Morrison, Charles S. (36 L. D., 126); modified, 36 L. D., 319.
- Morrow *et al. v.* State of Oregon *et al.* (32 L. D., 54); modified, 33 L. D., 101.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D., 100); overruled in part, 36 L. D., 551.
- Muller, Esberne K. (39 L. D., 72); modified, 39 L. D., 360.
- Nebraska, State of (18 L. D., 124); overruled, 28 L. D., 358.
- Nebraska, State of, *v.* Dorrington (2 C. L. L., 647); overruled, 26 L. D., 123.
- Neilsen *v.* Central Pacific R. R. Co. *et al.* (26 L. D., 252); modified, 30 L. D., 216.
- Newbanks *v.* Thompson (22 L. D., 490); overruled, 29 L. D., 108.
- Newton, Walter (22 L. D., 322); modified, 25 L. D., 188.
- New York Lode and Millsite (5 L. D., 513); overruled, 27 L. D., 373.
- Northern Pacific R. R. Co. (20 L. D., 191); modified, 22 L. D., 224; overruled, 29 L. D., 550.
- Northern Pacific R. R. Co. *v.* Bowman (7 L. D., 238); modified, 18 L. D., 224.
- Northern Pacific R. R. Co. *v.* Burns (6 L. D., 21); overruled, 20 L. D., 191.
- Northern Pacific R. R. Co. *v.* Loomis (21 L. D., 395); overruled 27 L. D., 464.
- Northern Pacific R. R. Co. *v.* Marshall *et al.* (17 L. D., 545); overruled, 28 L. D., 174.
- Northern Pacific R. R. Co. *v.* Miller (7 L. D., 100); overruled, 16 L. D., 229.
- Northern Pacific R. R. Co. *v.* Sherwood (28 L. D., 126); overruled, 29 L. D., 550.
- Northern Pacific R. R. Co. *v.* Symons (22 L. D., 686); overruled, 28 L. D., 95.
- Northern Pacific R. R. Co. *v.* Urquhart (8 L. D., 365); overruled, 28 L. D., 126.
- Northern Pacific R. R. Co. *v.* Yantis (8 L. D., 58); overruled, 12 L. D., 127.
- Nyman *v.* St. Paul, Minneapolis and Manitoba Ry. Co. (5 L. D., 396); overruled, 6 L. D., 750.
- O'Donnell, Thomas J. (28 L. D., 214); overruled, 35 L. D., 411.
- Olson *v.* Traver *et al.* (26 L. D., 350, 628); overruled, 29 L. D., 480; 30 L. D., 382.
- Opinion A. A. G. (35 L. D., 277); vacated, 36 L. D., 342.
- Oregon Central Military Wagon Road Co. *v.* Hart (17 L. D., 480); overruled, 18 L. D., 543.
- Owens *et al. v.* State of California (22 L. D., 369); overruled, 38 L. D., 253.
- Pacific Slope Lode (12 L. D., 686); overruled, 25 L. D., 518.
- Papini *v.* Alderson (1 B. L. P., 91); modified, 5 L. D., 256.
- Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284, 624.
- Paul Jones Lode (28 L. D., 120); modified, 31 L. D., 359.
- Paul *v.* Wiseman (21 L. D., 12); overruled, 27 L. D., 522.
- Pecos Irrigation and Improvement Co. (15 L. D., 470); overruled, 18 L. D., 168, 268.
- Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D., 854.
- Phillips, Alonzo (2 L. D., 321); overruled, 15 L. D., 424.
- Phillips *v.* Breazeale's Heirs (19 L. D., 573); overruled, 39 L. D., 93.
- Pietkiewicz *et al. v.* Richmond (29 L. D., 195); overruled, 37 L. D., 145.
- Pike's Peak Lode (14 L. D., 47); overruled, 20 L. D., 204.
- Popple, James (12 L. D., 433); overruled, 13 L. D., 588.
- Powell, D. C. (6 L. D., 302); modified, 15 L. D., 477.
- Premo, George (9 L. D., 70); see 39 L. D., 162, 225.
- Pringie, Wesley (13 L. D., 519); overruled, 29 L. D., 599.
- Provensal, Victor H. (30 L. D., 616); overruled, 35 L. D., 399.

- Prue, widow of Emanuel (6 L. D., 436); vacated, 33 L. D., 409.  
 Puyallup Allotments (20 L. D., 157); modified, 29 L. D., 628.  
 Rancho Alisal (1 L. D., 173); overruled, 5 L. D., 320.  
 Rankin, James D., *et al.* (7 L. D., 411); overruled, 35 L. D., 32.  
 Rankin, John M. (20 L. D., 272); reversed, 21 L. D., 404.  
 \*Reed v. Buffington (7 L. D., 154); overruled, 8 L. D., 110. (See 9 L. D., 360.)  
 Rialto No. 2 Placer Mining Claim (34 L. D., 44); overruled, 37 L. D., 250.  
 Rico Townsite (1 L. D., 556); modified, 5 L. D., 256.  
 Roberts v. Oregon Central Military Road Co. (19 L. D., 501); overruled, 31 L. D., 174.  
 Robinson, Stella G. (12 L. D., 443); overruled, 13 L. D., 1.  
 Rogers, Horace B. (10 L. D., 29); overruled, 14 L. D., 321.  
 Rogers v. Atlantic and Pacific R. R. Co. (6 L. D., 565); overruled, 8 L. D., 165.  
 \*Rogers v. Lukens (6 L. D., 111); overruled, 8 L. D., 110. (See 9 L. D., 360.)  
 Salsberry, Carroll (17 L. D., 170); overruled, 39 L. D., 93.  
 Satisfaction Extension Mill Site (14 L. D., 173); see Alaska Copper Co., 32 L. D., 128.  
 Sayles, Henry P. (2 L. D., 88); modified, 6 L. D., 797.  
 Schweitzer v. Hillard (19 L. D., 294); overruled, 26 L. D., 639.  
 Serrano v. Southern Pacific R. R. Co. (6 C. L. O., 93); overruled, 1 L. D., 380.  
 Shanley v. Moran (1 L. D., 162); overruled, 15 L. D., 424.  
 Shineberger, Joseph (8 L. D., 231); overruled, 9 L. D., 202.  
 Simpson, Lawrence W. (35 L. D., 399, 609); modified, 36 L. D., 205.  
 Stephen v. Ross (1 L. D., 634); modified, 4 L. D., 152.  
 Smead v. Southern Pacific R. R. Co. (21 L. D., 432); vacated, 29 L. D., 135.  
 Southern Pacific R. R. Co. (15 L. D., 460); reversed, 18 L. D., 275.  
 Southern Pacific R. R. Co. (28 L. D., 281); recalled, 32 L. D., 51.  
 Southern Pacific R. R. Co. (33 L. D., 89); recalled, 33 L. D., 528.  
 Southern Pacific R. R. Co. v. Burns (31 L. D., 272); vacated, 37 L. D., 243.  
 Spaulding v. Northern Pacific R. R. Co. (21 L. D., 57); overruled, 31 L. D., 151.  
 Spencer, James (6 L. D., 217); modified, 6 L. D., 772; 8 L. D., 467.  
 State of California (14 L. D., 253); vacated, 23 L. D., 230.  
 State of California (15 L. D., 10); overruled, 23 L. D., 423.  
 State of California (19 L. D., 585); vacated, 28 L. D., 57.  
 State of California (22 L. D., 428); overruled, 32 L. D., 34.  
 State of California v. Moccettini (19 L. D., 359); overruled, 31 L. D., 335.  
 State of California v. Pierce (3 C. L. O., 118); modified, 2 L. D., 854.  
 State of California v. Smith (5 L. D., 543); overruled, 18 L. D., 343.  
 State of Colorado (7 L. D., 490); overruled, 9 L. D., 408.  
 State of Florida (17 L. D., 355); reversed, 19 L. D., 76.  
 State of Louisiana (8 L. D., 126); modified, 9 L. D., 157.  
 State of Louisiana (24 L. D., 231); vacated, 26 L. D., 5.  
 State of Nebraska (18 L. D., 124); overruled, 28 L. D., 358.  
 State of Nebraska v. Dorrington (2 C. L. L., 647); overruled, 26 L. D., 123.  
 Stewart *et al.* v. Rees *et al.* (21 L. D., 446); overruled, 29 L. D., 401.  
 \*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L. D., 255); modified, 13 L. D., 354. (See 32 L. D., 21.)  
 St. Paul, M. & M. Ry. Co. v. Hagen (20 L. D., 249); overruled, 25 L. D., 86.  
 St. Paul, M. & M. Ry. Co. v. Fogelberg (29 L. D., 291); vacated, 30 L. D., 191.  
 Stricker, Lizzie (15 L. D., 74); overruled, 18 L. D., 283.  
 Sweeney v. Northern Pacific R. R. Co. (20 L. D., 394); overruled, 28 L. D., 174.  
 Sweeten v. Stevenson (3 L. D., 249); overruled, 3 L. D., 248.  
 Taft v. Chapin (14 L. D., 593); overruled, 17 L. D., 414.  
 Talkington's Heirs v. Hempfling (2 L. D., 46); overruled, 14 L. D., 200.  
 Tate, Sarah J. (10 L. D., 469); overruled, 21 L. D., 211.  
 Taylor v. Yeats *et al.* (8 L. D., 279); reversed, 10 L. D., 242.  
 \*Teller, John C. (26 L. D., 484); overruled, 36 L. D., 36. (See 37 L. D., 715.)  
 Traugh v. Ernst (2 L. D., 212); overruled, 3 L. D., 98.  
 Tripp v. Stewart (7 C. L. O., 39); modified, 6 L. D., 795.  
 Tucker v. Florida Ry. & Nav. Co. (19 L. D., 414); overruled, 25 L. D., 233.  
 Tupper v. Schwarz (2 L. D., 623); overruled, 6 L. D., 623.  
 Turner v. Lang (1 C. L. O., 51); modified, 5 L. D., 256.  
 Turner v. Cartwright (17 L. D., 414); modified, 21 L. D., 40.  
 Tyler, Charles (26 L. D., 699); overruled, 35 L. D., 411.  
 Ulin v. Colby (24 L. D., 311); overruled, 35 L. D., 549.  
 Union Pacific R. R. Co. (33 L. D., 89); recalled, 33 L. D., 528.  
 United States v. Bush (13 L. D., 529); overruled, 18 L. D., 441.  
 United States v. Dana (18 L. D., 161); modified, 28 L. D., 45.

# VIII. TABLE OF CIRCULARS AND INSTRUCTIONS.

Vine, James (14 L. D., 527); modified, 14 L. D., 622.	Wheaton v. Wallace (24 L. D., 100); modified, 34 L. D., 383.
Vradenburg's Heirs <i>et al.</i> v. Orr <i>et al.</i> (25 L. D., 323); overruled, 38 L. D., 253.	Wickstrom v. Calkins (20 L. D., 459); modified, 21 L. D., 553; overruled, 22 L. D., 392.
Walker v. Prosser (17 L. D., 85); reversed, 18 L. D., 425.	Widow of Emanuel Prue (6 L. D., 436); vacated, 33 L. D., 409.
Walker v. Southern Pacific R. R. Co. (24 L. D., 172); overruled, 28 L. D., 174.	Wiley, George P. (36 L. D., 305); modified, 36 L. D., 417.
Walters, David (15 L. D., 136); revoked, 24 L. D., 58.	Wilkins, Benjamin C. (2 L. D., 129); modified, 6 L. D., 797.
Wasmund v. Northern Pacific R. R. Co. (23 L. D., 445); vacated, 29 L. D., 224.	Willamette Valley and Cascade Mountain Wagon Road Co. v. Bruner (22 L. D., 654); vacated, 26 L. D., 357.
Waterhouse, William W. (9 L. D., 131); overruled, 18 L. D., 586.	Willamette Valley and Cascade Mountain Wagon Road Co. v. Chapman (13 L. D., 61); overruled, 20 L. D., 259.
Watson, Thomas E. (4 L. D., 169); modified, 6 L. D., 71.	Willingbeck, Christian P. (3 L. D., 383); modified, 5 L. D., 409.
Weber, Peter (7 L. D., 476); overruled, 9 L. D., 150.	Willis, Eliza (22 L. D., 426); overruled, 26 L. D., 436.
Werden v. Schlecht (20 L. D., 523); overruled, 24 L. D., 45.	

## TABLE OF CIRCULARS AND INSTRUCTIONS.

	Page.		Page.
January 29, 1909—Forfeiture proceedings.....	480	October 25, 1910—Parks.....	316
June 12, 1909—Coal classification.....	36	November 25, 1910—National forests.....	374
June 6, 1910—Isolated tracts.....	10	November 28, 1910—Fort McKinney.....	368
June 7, 1910—Kinkaid acts.....	18	December 7, 1910—Forest withdrawals.....	386
June 23, 1910—State selections.....	39	December 8, 1910—Enlarged homestead.....	386
June 25, 1910—Adverse claims—Alaska.....	49	December 9, 1910—Rules of Practice.....	395
June 27, 1910—Reclamation appeals.....	51	December 17, 1910—Reclamation entries.....	421
June 27, 1910—National forests.....	52	December 27, 1910—Minidoka project.....	528
July 6, 1910—Glacier National Park.....	67	December 31, 1910—Forest lands; final proof	436
July 9, 1910—Surface patents; Indian allotments.....	76	January 9, 1911—Township plat; notice.....	446
July 9, 1910—Utah lands.....	79	January 10, 1911—National parks.....	447
July 18, 1910—Enlarged homestead.....	96	January 19, 1911—Special agents' reports.....	458
July 19, 1910—Camp Bowie military reservation.....	124	January 23, 1911—Minidoka project.....	528
July 23, 1910—Wisconsin lands.....	111	January 23, 1911—Agricultural entries; coal lands.....	473
July 23, 1910—Repayment.....	141, 146	January 24, 1911—Belle Fourche project.....	531
July 26, 1910—Classification of mineral lands.....	113, 116	January 30, 1911—Water-right forms.....	532
July 31, 1910—Fort Davis military reservation.....	138	February 6, 1911—Shoshone project.....	537
August 2, 1910—Agricultural college grant.....	140	February 21, 1911—Reclamation homestead; assignment.....	504
August 4, 1910—Notation of contests, etc.....	150	February 21, 1911—Residence; extension of time.....	506
August 8, 1910—Coal lands.....	156	February 28, 1911—Second homestead and desert entries.....	524
August 10, 1910—Coal withdrawals.....	157	February 28, 1911—Reclamation; leases.....	525
August 18, 1910—Five-year notice.....	159	March 3, 1911—Red Lake lands.....	540
August 24, 1910—Enlarged homestead.....	164	March 6, 1911—Coal withdrawals.....	544
August 31, 1910—Spokane lands.....	172	March 7, 1911—Rule 10; notice.....	552
September 8, 1910—Agricultural entries; coal lands.....	179	March 9, 1911—Alaska surveys.....	553
September 9, 1910—Reclamation forms.....	197	March 11, 1911—Accounts; fees.....	556
September 12, 1910—Notice.....	200	March 13, 1911—Indian lands; right of way.....	565
September 13, 1910—Reclamation.....	202	March 17, 1911—Timber and stone fees.....	573
September 15, 1910—Attorneys.....	210	March 18, 1911—Minidoka project.....	529
September 15, 1910—Contest.....	217	March 21, 1911—Reclamation townsites; water supply.....	591
September 24, 1910—Residence.....	230	March 22, 1911—Witnesses.....	601
September 24, 1910—Suggestions to homesteaders.....	232	March 24, 1911—North Platte project.....	606
September 30, 1910—Desert lands.....	253	March 24, 1911—Minidoka project.....	531
October 3, 1910—Reclamation; leaves of absence.....	278	March 25, 1911—Shoshone project.....	538
October 11, 1910—Soldiers and sailors homesteads.....	291	March 27, 1911—Lower Yellowstone project.....	612
*October 15, 1910—Reclamation contests.....	296	March 28, 1911—Okanogan project.....	613
October 17, 1910—Equitable adjudication.....	320	March 28, 1911—Sun River project.....	614
October 20, 1910—Rights of way.....	309	March 30, 1911—Utah lands.....	617
October 21, 1910—Rights of way; reclamation projects.....	334	March 31, 1911—Minidoka project.....	530
		March 31, 1911—National forest homesteads.....	617

\* Read "or" for "of" in line 2, paragraph 19, page 296.

CIRCULARS AND INSTRUCTIONS CITED, CONSTRUED,  
AND MODIFIED.

	Page.		Page.
1873, December 20 (C. L. L., 1875, 244), seven-year notices.....	159	1908, June 6 (36 L. D., 567), right of way.....	335
1874, September 9 (C. L. L., 1875, 244), five-year notices.....	159	1908, June 10 (37 L. D., 46), records (par. 18).....	151
1885, October 21 (4 L. D., 202), township survey.....	442	1908, June 27 (36 L. D., 548), Alaska coal lands.....	328
1888, May 12 (6 L. D., 799), equitable adjudication.....	320	1908, July 11 (37 L. D., 20), Alaska coal lands.....	329
1890, April 24 (10 L. D., 502), equitable adjudication.....	320	1908, October 28 (37 L. D., 225), Kinkaid act.....	20
1898, June 8 (27 L. D., 248), Alaska homesteads.....	599	1908, November 30 (37 L. D., 312), Water right (par. 12).....	286, 288
1901, April 10 (30 L. D., 546) Indian allotments.....	513	Paragraph 27.....	130
1903, March 20 (32 L. D., 132), witnesses.....	601	1908, November 30 (37 L. D., 289), timber and stone.....	359, 380, 433, 449
1904, February 17 (32 L. D., 456), cultivation.....	264, 287	1909, February 16 (37 L. D., 449), constructive residence.....	243
1904, January 13 (32 L. D., 424), Alaska survey.....	599	1909, February 27 (37 L. D., 468), reclamation.....	582
1904, May 31 (32 L. D., 670), Kinkaid act.....	20	1909, March 16 (37 L. D., 492), timber.....	81
1904, June 3 (33 L. D., 10), confirmation of timber and stone entries.....	95	1909, March 29 (37 L. D., 728), mining regulations (par. 57).....	333
1904, June 27 (33 L. D., 58), witnesses.....	601	Paragraphs 60, 105, 106.....	303
1904, July 18 (33 L. D., 114), Alaska coal lands.....	322, 328	1909, April 10 (37 L. D., 638), additional entry (par. 14).....	164
1905, May 4 (33 L. D., 539), 320-acre limitation.....	496	Paragraph 21, widow, heirs, devisee.....	281
1905, June 6 (33 L. D., 607), reclamation; contest.....	297	1909, April 10 (37 L. D., 653), coal classification.....	36
1905, July 14 (34 L. D., 29), reclamation.....	520	1909, April 20 (37 L. D., 581), water right applications.....	3
1905, August 21 (34 L. D., 87), Kinkaid act.....	20	1909, April 22 (37 L. D., 655), amendments.....	33
1906, January 6 (34 L. D., 358), right of way forfeiture proceedings.....	481	1909, May 1 (37 L. D., 662), fees and accounts.....	115
1906, April 10 (34 L. D., 546), Kinkaid act.....	20	1909, May 21 (37 L. D., 787), rights of way.....	86
1906, July 16, 1906 (35 L. D., 29), reclamation homestead.....	4	1909, June 1 (38 L. D., 23), preference right.....	219
1906, October 19 (35 L. D., 239), pasture reserves.....	468	1909, August 11 (38 L. D., 131), final proof notices.....	263
1907, March 1 (35 L. D., 436), proofs, etc.....	128	1909, September 7 (38 L. D., 183), surface rights.....	156, 563
1907, April 12 (35 L. D., 673), coal lands.....	323, 328	1909, December 14 (38 L. D., 361), enlarged homestead.....	97, 164, 206
1907, April 24 (35 L. D., 681), coal lands.....	329, 494	Paragraph 8.....	168
Paragraph 5.....	436, 546	1910, January 29 (38 L. D., 405), rights of way; power sites.....	86, 90
1907, May 16 (35 L. D., 568), unearned fees and unofficial moneys.....	147, 573	1910, April 1 (38 L. D., 517), recertification.....	133
Paragraph 6.....	330	1910, April 18 (38 L. D., 576), surface rights.....	156
Paragraph 11.....	557	1910, May 31 (38 L. D., 620), reclamation contests.....	582
1907, May 16 (35 L. D., 572), Alaska coal lands (par. 7).....	328	Paragraphs 19-20.....	296
1907, July 26 (36 L. D., 44), enlargement of desert entries.....	48	1910, June 23 (39 L. D., 39) State selections.....	494
1907, September 30 (36 L. D., 112), special agents reports.....	103	1910, June 25 (39 L. D., 52), national forests.....	374
1907, October 18 (36 L. D., 124), commutation.....	243, 244, 456	1910, June 27 (39 L. D., 52), notice.....	200
1907, November 25 (36 L. D., 178), special agents reports.....	300	1910, July 13 (39 L. D., 96), enlarged homestead.....	208
1907, December 27 (36 L. D., 215), coal lands.....	494	1910, July 26 (39 L. D., 116), classification of mineral lands.....	113
1908, February 21 (36 L. D., 278), location of warrants, scrip, etc.....	111	1910, September 8 (39 L. D., 179), agricultural entries of coal lands (par. 2).....	473
1908, March 21 (36 L. D., 318), notice of claim to coal lands.....	157	1910, September 13 (39 L. D., 202), reclamation; leaves of absence.....	278, 421
1908, March 26 (36 L. D., 347), notice of location of warrants, etc.....	111	Assignments.....	298, 421
1908, April 29 (36 L. D., 388), repayment.....	154	Entry.....	421
1908, June 2 (36 L. D., 452), Turtle Mountain lands.....	513	1910, September 15 (39 L. D., 217), contest.....	342, 541
		1910, December 17 (39 L. D., 421), reclamation entries.....	505
		1911, March 6 (39 L. D., 544), coal withdrawals.....	604

## ACTS OF CONGRESS CITED AND CONSTRUED.

	Page.		Page.
1812, April 8 (2 Stat., 701), Louisiana.....	55	1890, July 3 (26 Stat., 215), sec. 8, university lands.....	584
1815, February 17 (3 Stat., 211), New Madrid act.....	417	1890, August 29 (26 Stat., 369), railroad lands.....	71
1819, February 22 (8 Stat., 252), Louisiana boundary.....	56	1890, August 30 (26 Stat., 371, 391), arid land.....	28
1822, April 26 (3 Stat., 668), New Madrid locations.....	417	1890, August 30 (26 Stat., 371, 391), aggregate area.....	254, 496
1828, January 12 (8 Stat., 372), Louisiana boundary.....	56	1890, September 30 (26 Stat., 502), cemeteries.....	384
1838, April 25 (8 Stat., 511), Louisiana-Texas boundary.....	54	1891, March 3 (26 Stat., 854), secs. 16-17, small holding claim.....	136
1841, September 4 (5 Stat., 453), pre-emption.....	615	1891, March 3 (26 Stat., 1095), sec. 2, desert land.....	129, 287
1843, March 3 (5 Stat., 620), sec. 5, settlement.....	282	Section 7, confirmation.....	94, 326, 332, 437, 562
1848, February 2 (9 Stat., 922), Mexican treaty.....	136, 424	Section 12, Alaskan lands.....	598
1848, July 5 (9 Stat., 245), Louisiana-Texas boundary.....	55	Sections 18-21, right of way.....	104, 334
1858, July 17 (10 Stat., 304), Sioux scrip.....	555	Section 20, right of way.....	480, 481
1854, July 22 (10 Stat., 308), private claim.....	137, 424	Section 24, forest reserves.....	93, 415, 484
1864, July 2 (13 Stat., 365), Northern Pacific grant.....	314, 565	1892, July 26 (27 Stat., 270), preference right.....	541
1866, July 25 (14 Stat., 239), Central Pacific.....	6, 169, 289	1892, August 4 (27 Stat., 348), timber and stone land.....	359
1866, July 27 (14 Stat., 292), Atlantic and Pacific.....	136, 336, 425	1893, February 21 (27 Stat., 470), private claim.....	136
1870, May 31 (16 Stat., 378), Northern Pacific grant.....	389	1893, March 3 (27 Stat., 593), State selection.....	345, 392, 474
1872, May 10 (17 Stat., 91), mining claims.....	303	1894, August 13 (28 Stat., 279), surety on bond.....	184
1872, June 8 (17 Stat., 333), soldiers' additional.....	109, 443	1894, August 18 (28 Stat., 372, 394), survey.....	344, 482, 584, 600
1873, March 3 (17 Stat., 605), soldiers' additional.....	109	1894, August 23 (28 Stat., 491), military reservation.....	125, 369
1874, June 22 (18 Stat., 194), railroad indemnity.....	70	1894, December 13 (28 Stat., 594), warrants.....	450
1875, March 3 (18 Stat., 482), right of way.....	32, 86, 89, 175, 209	1895, February 20 (28 Stat., 677), Southern Ute lands.....	463
1876, December 28 (19 Stat., 500), Ware scrip.....	417	1895, February 26 (28 Stat., 683), classification of mineral land.....	113, 116
1877, March 3 (19 Stat., 377), desert land.....	253, 287	1897, February 11 (29 Stat., 526), oil lands.....	461
1878, June 3 (20 Stat., 88), timber cutting.....	81	1897, February 26 (29 Stat., 599), reservoir sites.....	29
1878, June 3 (20 Stat., 89), timber and stone.....	326, 329, 359, 449, 573	1897, June 4 (30 Stat., 36), lieu selections.....	77, 177, 319, 384, 442, 608, 611
1879, March 3 (20 Stat., 472), additional homestead.....	347	1898, May 11 (30 Stat., 404), sec. 2, right of way.....	104, 309
1879, March 3 (20 Stat., 472), proof.....	317	1898, May 14 (30 Stat., 409), sec. 1, Alaska homesteads.....	514, 599
1880, May 14 (21 Stat., 140), sec. 1, relinquishment.....	268	Section 10, trade or business.....	514
Section 2, contestant.....	342, 434, 489	1898, June 16 (30 Stat., 473), military service.....	291
Section 3, settlement.....	280	1898, July 1 (30 Stat., 597, 620), Northern Pacific adjustment.....	230, 318, 389
1880, June 15 (21 Stat., 199), Ute reservation.....	615	1899, March 2 (30 Stat., 990), right of way.....	45, 175
1880, June 16 (21 Stat., 287), repayment.....	141, 147, 154	1899, March 2 (30 Stat., 993), railroad land.....	371, 584
Section 2, repayment.....	91, 478	1899, April 13 (31 Stat., 1947), Southern Ute lands.....	463
1884, May 17 (23 Stat., 24), sec. 8, Alaska lands.....	597	1900, June 5 (31 Stat., 267), sec. 2, second homestead.....	99, 251
1884, July 5 (23 Stat., 103), abandoned military reservation.....	124, 138, 369	1900, June 6 (31 Stat., 683), settlement by single woman.....	364
1888, May 1 (25 Stat., 133), sec. 3, Gros Ventre lands.....	561	1901, February 15 (31 Stat., 790), right of way.....	416
1888, October 2 (25 Stat., 505, 526), arid lands.....	28	1901, March 1 (31 Stat., 847), military service.....	291
1889, January 14 (25 Stat., 642), Chippewa lands.....	219, 511	1902, May 22 (32 Stat., 203), sec. 2, second entries.....	99, 251
1889, March 2 (25 Stat., 854), sec. 1, private entry.....	13	1902, May 27 (32 Stat., 245, 266), Spokane lands.....	172
1889, March 2 (25 Stat., 854), sec. 3, leave of absence.....	74, 361		
Section 5, additional entry.....	347		

	Page.		Page.
1902, May 27 (32 Stat., 742), Spokane lands...	172	1908, February 8 (35 Stat., 6), second home-	
1902, June 13 (32 Stat., 384), Ute lands...	464	stead.....	219, 466
1902, June 17 (32 Stat., 388), reclamation... 2, 48, 197,		1908, March 26 (35 Stat., 48), repayment. 146, 192, 573	
203, 297, 432, 502, 526, 528, 531, 532, 536; 537, 572		Section 1, repayment.....	153, 497
1902, June 19 (32 Stat., 744), Spokane lands...	172	Section 2, repayment.....	91
1902, June 27 (32 Stat., 400), Chippewa lands	219	1908, March 28 (35 Stat., 52), desert entry..	477, 538
1902, July 1 (32 Stat., 728), Imperial Valley		1908, May 20 (35 Stat., 169), drainage.....	541
lands.....	472	1908, May 23 (35 Stat., 268), Chippewa lands	219
1903, January 31 (32 Stat., 790), witnesses..	601	1908, May 27 (35 Stat., 317, 377), fees and	
1903, March 3 (32 Stat., 1028), Alaska loca-		mileage.....	602
tions.....	514, 598	1908, May 28 (35 Stat., 424), Alaska coal	
1904, February 20 (33 Stat., 46), Red Lake		lands.....	323
lands.....	456, 540	1908, May 29 (35 Stat., 457), sec. 24, Kiowa	
1904, April 19 (33 Stat., 184), railroad settlers	307	lands.....	469
1904, April 21 (33 Stat., 189), Turtle Moun-		1908, May 29 (35 Stat., 458), Spokane lands..	172
tain lands.....	508	1908, May 29 (35 Stat., 465), sec 6, railroad	
1904, April 23 (33 Stat., 297), Devils Lake		settlers.....	222, 305
lands.....	435	Section 7, Kinkaid act.....	17, 18
1904, April 27 (33 Stat., 322), Devils Lake		Section 9, commutation.....	75
lands.....	435	1909, February 16 (35 Stat., 2226), Tongass	
1904, April 28 (33 Stat., 525), Alaska coal		forest.....	599
lands.....	322, 327	1909, February 19 (35 Stat., 639), enlarged	
1904, April 28 (33 Stat., 547), sec. 3, prefer-		homestead.....	97, 240, 292, 605
ence right.....	1	Section 1, enlarged homestead.....	248
Section 2, additional entry.....	17, 18, 37	Section 3, additional.....	34, 37, 164, 181, 206, 346
1904, April 28 (33 Stat., 550), small holdings.	135	Section 6, entry without residence. 167, 251, 386	
1904, June 2 (33 Stat., 2368), Devils Lake		1909, March 3 (35 Stat., 844), surface rights..	76,
lands.....	435	156, 180, 338, 494, 545, 563	
1905, February 1 (33 Stat., 628), forest re-		1910, March 15 (36 Stat., 237), grant to	
serves.....	416	Johnson county.....	369
1905, October 3 (34 Stat., 3178), Portales for-		1910, March 23 (36 Stat., 241), bonds.....	184
est reserve.....	415	1910, April 4 (36 Stat., 269, 285), Strawberry	
1906, April 16 (34 Stat., 116), sec. 4, water		Valley project.....	527
supply for townsites.....	593	1910, May 11 (36 Stat., 354), Glacier National	
1906, May 17 (34 Stat., 197), Northern Pacific		Park.....	67
adjustment.....	230, 318	1910, May 13 (36 Stat., pt. 2, p. 312), treaty	
1906, June 5 (34 Stat., 213), Kiowa lands...	468	with Canada.....	334
1906, June 11 (34 Stat., 233), forest home-		1910, June 7 (36 Stat., 459), parks.....	316
stead.....	92, 386, 411, 414, 463, 605	1910, June 7 (36 Stat., 459), adverse claims..	49
1906, June 21 (34 Stat., 325, 377), townsite..	44	1910, June 11 (36 Stat., 465), reclamation	
1906, June 21 (34 Stat., 325, 354), sec. 17,		town lots.....	205, 421
'townsite.....	516	1910, June 15 (36 Stat., 331), Wisconsin land.	111
1906, June 27 (34 Stat., 517), isolated tracts.	10, 22	1910, June 17 (36 Stat., 531), enlarged home-	
1906, June 27 (34 Stat., 519), sec. 5, desert		stead.....	96, 249, 252, 292, 387
entry.....	268, 381, 520	1910, June 22 (36 Stat., 583), agricultural	
1906, November 6 (34 Stat., 3256), Coeur		entries; coal lands.....	76,
d'Alene forest.....	343	156, 179, 240, 255, 339, 463, 465, 473, 494, 545, 604	
1907, January 16 (34 Stat., 2953), Engle		1910, June 23 (36 Stat., 592), reclamation	
dam.....	105	entries.....	204, 298, 421, 505
1907, February 2 (34 Stat., 142), extension		1910, June 25 (36 Stat., 739), classification of	
of time for residence.....	9	mineral lands.....	113, 116
1907, March 1 (34 Stat., 1052), cemeteries...	384	1910, June 25 (36 Stat., 703, 741), Alaska sur-	
1907, March 1 (34 Stat., 1056), Ute lands...	464	veys.....	553
1907, March 2 (34 Stat., 1224), Kinkaid act...	10, 20	1910, June 25 (36 Stat., 835), reclamation..	203,
1907, March 2 (34 Stat., 1245), sec. 4, un-		421, 432	
earned fees and unofficial moneys.....	330	1910, June 25 (36 Stat., 846), agricultural col-	
1907, March 2 (34 Stat., 3309), Priest River		lege grant.....	140
forest reserve.....	445	1910, June 25 (36 Stat., 847), withdrawals..	88,
1907, March 16 (35 Stat., 2120), Portales na-		156, 158, 339, 544, 563, 604	
tional forest.....	415	1910, June 25 (36 Stat., 864), leave of ab-	
1907, May 27 (35 Stat., 2139), Santa Rita		sence.....	203, 278, 421
national forest.....	279	1910, June 25 (36 Stat., 867), Imperial Valley	
1907, June 4 (34 Stat., 1357), Engle dam.....	106	lands.....	268
1907, June 8 (35 Stat., 2143), Devils Lake		1910, June 25 (36 Stat., 885), railroad set-	
lands.....	435	tlers.....	306

	Page.		Page.
1911, February 3 (Public—340), second homestead and desert entries.....	524	1911, March 3 (Public—454), sec. 21, Uintah homesteads.....	617
1911, February 13 (Public—353), reclamation notices.....	529, 538, 606, 613, 614	1911, March 3 (Public—462), Gros Ventre lands.....	564
1911, February 13 (Public—357), extension of time.....	506	1911, March 3 (Public—469), withdrawals; homesteads.....	618
1911, February 16 (Public—382), Red Lake lands.....	540	Section 2, preference right.....	612
		1911, March 4 (Public—501), fees.....	556

## REVISED STATUTES CITED AND CONSTRUED.

Section.	Page.	Section.	Page.
452.....	177	2307.....	109, 293, 406
550.....	603	2318.....	312
914.....	63	2319.....	312
2288.....	247, 384	2326.....	354
2289.....	131, 190, 251, 299, 365	2347-2351.....	326
2290.....	132, 367	2362-3.....	141, 147
2291.....	225, 248, 293, 347	2373.....	370
2301.....	74, 225, 329, 562	2387.....	356
2302.....	312	2448.....	576
2304.....	293	2450.....	320
2305.....	291	2455.....	10, 322
2306.....	94, 109, 211, 442, 466, 551, 561, 598, 603	3477.....	145, 148

## RULES OF PRACTICE CITED AND CONSTRUED.

Rule.	Page.	Rule.	Page.
10 (Rules of 1910).....	552	104-106.....	161
17-18.....	162		



DECISIONS  
RELATING TO  
THE PUBLIC LANDS.

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HOMESTEAD ENTRY—KINKAID ACT—COMPACTNESS.

RUSSELL A. HEYWOOD.

With respect to the question of compactness, an entryman under the Kinkaid act is entitled to take any legal subdivision of public land he desires and then fill out or complete his entry by the selection of other lands in addition thereto so as to make the entire entry in a form as compact as possible, considering the status of the surrounding lands.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 2, 1910.* (J. H. T.)

Russell A. Heywood has appealed from your office decision of January 20, 1910, requiring him to amend his homestead entry made July 31, 1908, under section 3 act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid act, for the NE.  $\frac{1}{4}$  Sec. 3, and N.  $\frac{1}{2}$  Sec. 2, T. 28 N., R. 41 W., Alliance, Nebraska, land district. Entryman had made a former entry for 160 acres.

In your said decision you found and held that the entry was not in the most compact form possible, as required by the said act, inasmuch as all of section 1 and the S.  $\frac{1}{2}$  section 2 were vacant and are now vacant, and therefore it would be possible to take lands in a more compact form.

Upon appeal the entryman states that upon examination of the land before making entry he found the only available farming land in that vicinity to be in the northeast quarter of said section 3; that all of section 3 excepting the northeast quarter had been appropriated, and that all contiguous land on the north of section 3 had been appropriated; that the only way for filling out the 480 acres to which he was entitled was by going into section 2. He further states that a soldiers' declaratory statement at that time covered the south half of section 2. He states that he had a right to make a

starting point with the vacant land in section 3 and take the remainder contiguous thereto in a form as nearly compact as possible; that with this beginning the northeast quarter and the north half of section 2 is as compact as it was possible to get when taken in consideration with adjoining entries. There is merit in the contentions of the claimant. In the first place, if the south half of section 2 was covered by soldiers' declaratory statement as alleged by claimant, the entry is made in a form as compact as possible unless entryman had omitted entirely the lands in sections 2 and 3, and had confined his entry to section 1. Even if the record was clear as to all of the lands in section 2 as stated by you, which, it is assumed, is correct, the entry could be made but little more compact. But aside from this, it is believed that claimant was entitled, as insisted by him, to select the northeast quarter of section 3, and this being so, the only further requirement was to complete the entry by the selection of other lands in addition thereto so as to make the entire entry in a form as compact as possible considering the status of the surrounding lands. When considered in this view it appears the entry is sufficiently compact. The same will be allowed to stand.

Your decision is accordingly reversed.

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#### RECLAMATION WATER CHARGES—IRRIGABLE AREA—PRACTICE.

##### WILLISTON LAND COMPANY.

An applicant for water rights under a reclamation project is required to pay for water for the entire irrigable area of his entry as shown on the plat upon which the construction charges were apportioned; and where mistake in the plat is alleged as to the irrigable area of the entry, application for correction thereof should be made to the local officer of the Reclamation Service.

No deduction from the irrigable area subject to water charges will be made on account of easements for highways or irrigating ditches.

Appeals from the action of a project engineer lie in the first instance to the Director of the Reclamation Service, with right of further appeal to the Secretary of the Interior.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, June 4, 1910. (F. W. C.) (J. R. W.)*

November 19, 1909, you transmitted the papers in case of Williston Land Company, applicant for water rights in the Williston Project, Nos. 012297, 012298, under act of June 17, 1902 (32 Stat., 388).

The Williston project was undertaken to irrigate 3083 acres, of which ten acres were public lands, 198 State lands, and 2875 lands in private ownership. April 24, 1908, the farm units were fixed by the Secretary of the Interior. The Williston Land Company appears to

be owner of S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 13—sixty acres; also of NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , west fifteen acres of NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , and all land east of the canal in SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 14, except E.  $\frac{1}{2}$  of E.  $\frac{1}{2}$  of it. By its applications for water right, the company claims credit for 8.03 acres included in canal right of way and 3.7 acres included in highways. No such credit appears in the plat of the project, upon which charges for construction were apportioned. The project engineer refused to approve the application and the local land office, under instructions of April 20, 1909 (37 L. D., 581), refused, for lack of such approval, to grant the water right applied for. The applicant appealed to your office. Your decision held:

Insomuch as it is not within the jurisdiction of this office to review the decisions of the project engineer, this office can make no decision in this case, other than to state that the water right applications will not be accepted unless approved by the project engineer.

The Williston Land Company assigns error in your so holding:

1. In refusing to furnish water for a smaller number of acres than the number shown to be irrigable in the farm unit plat prepared by U. S. R. S. engineers, regardless of the number of acres that are actually irrigable in said farm unit; 2, error in holding that the perfunctory signing by the Secretary of the Interior of a farm unit plat is in effect a determination of the irrigable area of the tract; 3, error in holding that the determination of the irrigable area is a matter within jurisdiction of the Secretary of the Interior; 4, inexcusable error and excusable kick in the absolutely inexcusable delay in securing a decision in said matter.

In argument counsel ask that the following questions may be specifically answered:

1. Is a water user under a United States reclamation project required to pay for the number of acres shown to be irrigable on a farm unit plat prepared by the U. S. R. S. regardless of the number of acres actually irrigable in said farm unit. 2. Are roads, highways, and land occupied by canals and ditches, and rights of way therefor from which no revenue can be derived as irrigated land, to be included in the measured land classed as irrigable in a farm unit. 3. Is a water user obliged to apply for water for all the land designated as irrigable, whether he wants to use water on all of said land or not, or can he make application for water for a portion of said land only.

It was held in Williston Land Company (37 L. D., 428, 429) that "one object of the irrigation act was to assure return of the cost to the Treasury; another was to protect those who had acquired properties before construction of public reclamation works." The primary object of the reclamation act was stated to be:

To render the arid public lands capable of productive agriculture and to assure their disposal in small holdings as homes of a resident home-owning agricultural population. It was known and recognized in the act that pioneers had gone upon these fertile valley lands, reduced some of them to private ownership, and appropriated some of the available waters.

The question then considered was whether a corporation was entitled to obtain a water right, and in determining that it was so entitled, the Department held that:

To hold otherwise, would tend to embarrass and defeat one object of the act which clearly intends to assure reimbursement of the United States for all its expenditures by equitable—that is to say ratable—apportionment of the entire cost on all the lands irrigable. If lands in corporate holdings are excluded from water service, the cost must be apportioned inequitably and unratably on only part of the lands irrigable, or the United States must remain in part not reimbursed, so long as any of the land irrigable remains in corporate holding.

It was also held by the Department in instructions (35 L. D., 29, 31) that:

The right of entry and the right to the use of water are inseparable. It is not a privilege or right of the homesteader to take water or not, as he may wish, or in such quantities as he may wish to apply for, but he is chargeable with his equitable proportion of the water apportioned to the land entered. Every application to enter lands withdrawn for disposal under the reclamation act is an application for the water right appurtenant thereto, which attaches by virtue of the statute.

In entering upon a reclamation project the Government must consider the total area under water lines of a proposed system and apportion the cost upon the area—that is, divide the cost by the number of acres, which is an equitable apportionment. If mistakes are made in estimating the area that can be irrigated—that is, the area lying under the water line—the proper way to correct it is by bringing it to notice of the local officer of the Irrigation Service, with an application to exonerate it from contribution to the project, because it receives no benefit. As to land subject to easements for highways or irrigating ditches credit is not due. The States generally do not abate from the taxable area the land subject to easements for public highways. No more reason exists for exempting such lands from irrigation charges. While a highway may not be irrigated and cultivated, the remainder of the tract is that much more valuable because of the highways and the irrigation system, so that the charge is ratable and equitable. Were such areas deducted, the rate per acre would be increased, and the same practical result attained after reapportionment of the total cost on the reduced total area. The specific questions 1, 2, and 3 are thus answered.

The 4th question is: "Is a project engineer the final authority and court of last resort in deciding whether or not a water right application can be approved; if not, how and to whom can appeal be made?" The answer to this is, that the Secretary of the Interior is the supervising head of the Reclamation Service, as he is of the land department and the Indian office. Persons dealing with the Reclamation Service have right to ask his ultimate decision, as

do persons dealing with the Indian Office and the General Land Office. The project engineer is simply the local representative of the Secretary of the Interior in deciding such matter. If a water applicant allege and show that error has been made by the project engineer, as, for instance, that a portion of his land is above the water line and receives no benefit, it is within the power of the Secretary to correct such mistake. It is not, however, the right of a private land owner to refuse to take water for all of his irrigable land after he has subjected it to charges for reimbursement of the United States in construction of the project. The United States can not force him to subject his land, but if he does subject it, he is not entitled to claim water for a fraction of it and leave the United States not reimbursed for his portion of the project. His subjecting his land was one of the inducements moving the United States to construction of the project, and his obligation is fixed.

Under the regulations the land office can grant water rights only upon approval of the project engineer. So there was no error in the action of the local office or of your office. Neither the local office nor general land office can review the action of the project engineer. That can be done only by appeal to the Director of the Reclamation Service; and further from his action to the Secretary of the Interior—supervising head of the Reclamation Service.

A copy of this decision will be transmitted to the Reclamation Service for its information and as aid to draft of such regulations [see 39 L. D., 51] as may be found necessary to review errors that may occur as to the area of the irrigable land embraced in a project or farm unit.

#### RAILROAD GRANT—SETTLEMENT CLAIM—UNSURVEYED LAND.

##### PERRY v. CENTRAL PACIFIC R. R. Co.

Where a tract of unsurveyed land within the primary limits of a railroad grant was at date of definite location of the road in good faith occupied by a qualified homestead settler, and by conveyance and connected and continuous occupancy the right passed from one settler to another down to date of filing the township plat of survey, the rights of the settler are superior to claim of the company under its grant.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 4, 1910.* (J. R. W.)

John F. Perry appealed from your decision of June 29, 1909, canceling his homestead entry for lots 4, 5, 6, Sec. 31, T. 44 N., R. 6 W., M. D. M., Redding, California.

The land is within primary limits of grant by act of July 25, 1866 (14 Stat., 239), to the Central Pacific Railroad Company. The railroad was definitely located opposite the tract August 17, 1871. The township plat of survey was filed in the local office January 3, 1906. October 5, 1906, Perry made entry, alleging in his application that:

From about the year 1860 said land was occupied and claimed by one George Garvey, citizen of the United States qualified to make a homestead entry. About the year 1880 said Garvey sold his possessory claim to said land to Edwin N. Perry, father of affiant, who turned the same over to affiant shortly before his death in the year 1902. That said land has been recently surveyed and affiant desires to perfect his title.

The local office allowed the entry. May 27, 1909, the Central Pacific Railway Company, successor to the grantee company, filed its protest against the entry. On authority of *Oregon and California Railroad Company v. Croy* (30 L. D., 241), you held the entry for cancellation, citing also *Tarpey v. Madsen* (178 U. S., 215). In your opinion the land inured to the railroad company under its grant.

Section 2 of the act making the grant provided that:

When any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof.

The homestead settler manages his own appeal. In it he states:

This land which I homestead was occupied before the grant was given and continuously ever since by George Garvey, also by T. Willis, also by Frank Slonerger, from whom my father bought the land or squatter's right. This land being unsurveyed, none of these settlers could file a homestead. My father came on this place in 1881 and lived on it 21 years in undisputed possession when he deeded it to me, the land being still unsurveyed. I wrote the land office in regard to the land and they told me to stay on it and when it became surveyed I would have the first right to homestead. As soon as it was surveyed I filed a homestead, but first wrote the Southern Pacific and they told me to go ahead and file, they would not bother me, and so I did. Now they are trying to get my filing canceled. This little place does not amount to much to the S. P. R., still to us it amounts to a good deal. We have lived here 7 years, and are trying to make a little home. We are getting old and to lose this place after 7 years of hard work does not seem right and just. I think after you learn all the facts of the case you will decide in my favor.

This appears to assert, though some of the facts are not distinctly stated, that prior to the grant George Garvey, a qualified homestead settler, settled upon and occupied the land, then unsurveyed, with intent to make a homestead entry; that later he conveyed his improvements to T. Willis, likewise a qualified homestead settler, who in turn conveyed it to Frank E. Slonerger, likewise a qualified homestead settler, who transferred it to E. N. Perry, father of the present

entryman, who lived on it twenty-one years prior to 1902, or ever since 1881, and transferred it to his son, John F. Perry, the present entryman. If this be true, the land from prior to the grant has been continuously in the occupancy of a succession of qualified homesteaders, who have improved it and made it their home, though it was not surveyed, nor was opportunity given to any of them to make homestead entry until January, 1906. The settler states that he wrote to the present railway claimant stating his claim, its origin, and circumstances, and the railroad company told him to go ahead and make entry and they would not claim his land.

In *Tarpey v. Madsen* (178 U. S., 215, 219), the court discussed the rights of settlers on unsurveyed public land within a railroad grant, and held:

The right of one who has actually occupied, with an intent to make a homestead or preemption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. . . . Where the accident or omission is not the fault of the party but of the Government, or some official of the government, such accident or omission cannot defeat the right of the individual. . . . If Olney, the original entryman, was pressing his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire. But when the original entryman, either because he does not care to perfect his claim to the land or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title—apparently perfect and unquestioned during these many years—he does not come in the attitude of an equitable appellant to the consideration of the court.

In that case the land had long been surveyed, as one Olney had filed a preemption declaratory statement in October, 1868, which he never perfected, and Madsen, the then claimant, nowise connected himself in privity of estate or claim with Olney. Olney seems to have abandoned, after which Madsen settled. In view of such facts, the court held the grant operative, and the grantee of the railroad company recovered. The court, however, cited with approval the case of *Lamb v. Davenport* (18 Wall., 307), and recognized that the rights and improvements of qualified *bona fide* settlers are "subjects of bargain and sale, and, as between the parties to such contracts, they are valid." It thus appears that had Garvey continued in occupation of this piece of land to the date when it was surveyed and opened to entry, his rights would have been superior to those of the railroad company. This is also clear from the decision of the court in *Nelson v. Northern Pacific Railway Company* (188 U. S., 108). In that case Nelson settled prior to definite location of the road. The land was not surveyed until 1893, and as soon as surveyed Nelson attempted to make entry, but was denied by the land department, and patent was issued to the railroad company. Speaking of the rights of a settler

as excepted the land from operation of the grant, the court referred to the conditions of the country as wild and inhabited by none but Indians, and said that the primary object of the grant was to secure safe and speedy transportation of mails, troops, munitions of war, and public stores from one coast to the other, as an element of national strength and defense. The court remarked that the public lands in a vast region were unsurveyed, and it was not known when they would be surveyed, but that it was deemed important to encourage settlement of the country along the proposed railroad. In view of these facts, the court held:

Necessarily the act must be interpreted in the light of that situation. It should not be so interpreted as to justify the charge that the Government laid a trap for honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families. And it should not be supposed that Congress had in view only the interests of the company, which, with the aid of a munificent grant of lands, was empowered to connect Lake Superior and Puget Sound with a railroad and telegraph line.

Many authorities are cited and discussed by the court, which held (page 119) that the railroad company "could take no lands except such as were unappropriated at the time its line was definitely fixed."

It is well established in the land laws that land is as effectually appropriated by settlement under the homestead law as by entry. The settler can not be defeated of his right except by failure to enter within three months after the land is open to entry. If, as Perry alleges, Garvey was a qualified homestead settler intending to make entry, the land was as effectually appropriated as if he had made an entry, the Government being in default of survey and of opening its land. The land was within the exception of the act of 1866, as "occupied by homestead settlers."

This, however, is not contrary to departmental decision in Oregon and California R. R. Co. v. Croy, *supra*. It was there merely held that the occupancy of land by a qualified homesteader would not except the land from the grant where the settler afterwards abandoned his rights. In that case Croy, the claimant, did not by any allegation or proof connect himself with Frank Howard, the original settler. In the present case, as the allegations of the appeal are understood, it was a connected and continuous occupancy by conveyance of right from one settler to another, whereby there was privity of estate, and between the present claimant and his father, who had held the land twenty-one years, there was privity of blood and succession as heir.

In view of the Department, if such facts exist, the present claimant, Perry, would be entitled to hold the land excepted from the grant.



But, aside from this, Perry alleges that he communicated the facts to the railroad company; that he has its letter saying that they would not dispute his claim. If he has since expended labor and money in developing his home, the railroad company is on every ground of equitable estoppel barred from taking his home from him, independently of the fact whether there could be an exception from the grant by conveyance from one qualified settler to another.

Your decision is therefore vacated, and you will order a hearing between the parties—Perry, the claimant, and the railroad company—at which Perry may be allowed to prove the origin and succession of his possessory right from Garvey to himself, and may show by letter of the railroad company, which he says he has, that the company waived its claim adverse to him.

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**COMMUTATION—CONSTRUCTIVE RESIDENCE—JOINT RESOLUTION OF  
FEBRUARY 2, 1907.**

**JOHN GEORGE KUNTZ.**

A homestead entryman within the provisions of the joint resolution of February 2, 1907, who establishes residence within the extended period fixed thereby, although after the expiration of six months from the date of entry, is entitled, on commutation of his entry, to credit for constructive residence for a period of six months.

*First Assistant Secretary Pierce to the Commissioner of the General  
(F. W. C.) Land Office, June 6, 1910. (E. L. C.)*

On September 13, 1906, John George Kuntz made homestead entry No. 5252 for the SW.  $\frac{1}{4}$ , Sec. 20, T. 15 N., R. 26 E., W. M., North Yakima, Washington, land district, upon which commutation proof was offered February 3, 1908, but action thereon was deferred pending investigation by a special agent.

By your office letter "P" of April 17, 1909, you directed the issuance of final certificate and final commutation certificate No. 01878 issued May 3, 1909.

In your office decision of January 5, 1910, you state:

Upon further consideration of this case, it is noted that claimant established residence on May 1, 1907, 48 days after the expiration of six months from date of entry, and that nine months and 3 days after establishing residence commutation proof was offered. The claimant is therefore not entitled to credit for six months constructive residence, and his residence is not sufficient to sustain commutation proof.

Your decision is erroneous. The joint resolution of Congress approved February 2, 1907 (34 Stat., 1421), provides as follows:

That all persons who made homestead entry in States of North Dakota, South Dakota, Idaho, Minnesota, Montana, Washington, and Wyoming, where

the period in which they were, or are, required by law to make entry under such declaratory statement or establish residence, expired or expires, after December first, nineteen hundred and six, are hereby granted until May fifteenth, nineteen hundred and seven, within which to make such entry or actual settlement and establish residence upon the lands so entered by them: *Provided*, That this extension of time shall not shorten either the period of commutation or of actual residence under the homestead law: *Provided further*, That the provisions of Public Resolution Numbered Four, approved January eighteenth, nineteen hundred and seven, shall apply to the States of Idaho and Washington.

As the time within which entryman was required to go upon his land did not expire until after December 1, 1906, he was entitled to the benefit of said resolution and did not lose any of the rights formerly acquired. He could not, therefore, properly be declared in default until after the expiration of the time specified in said resolution, to wit, May 15, 1907.

The purpose of said act was not to take away any of the rights previously granted to homestead entrymen, but was simply for the purpose of extending the time within which they were required to establish actual residence and settlement upon the land. Entryman was therefore entitled to his six months' constructive residence, inasmuch as he established his residence upon the land prior to the expiration of the period specified in said act. After establishing his residence upon the land May 1, 1907, the residence of the defendant was practically continuous from that date on for a period of nine months. His period of residence upon the land was therefor sufficient, and in the absence of any further objection, his entry should have been passed to patent.

Your decision is accordingly reversed and the final proof will be accepted and the entry passed to patent in the absence of any other objection.

ISOLATED TRACTS—SECTION 2455, R. S., AS AMENDED BY ACT OF JUNE 27, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., June 6, 1910.

*Registers and Receivers, United States Land Offices.*

SIRS: The sale of isolated tracts of public lands outside of the area in the State of Nebraska described in the act of March 2, 1907 (34 Stats., 1224), is authorized by the provisions of the act of June 27, 1906 (34 Stats., 517), amending section 2455 of the Revised Statutes.

1. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated.

PROPERTY OF THE  
GENERAL LAND OFFICE

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts, the area of which, when added to the area now applied for, will exceed approximately 160 acres; and that he is a citizen of the United States, or has declared his intention to become such. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

3. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the applications are situated.

4. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

5. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands, the area of which, when added to the area applied for, shall exceed approximately 160 acres.

6. No sale will be authorized for more than approximately 160 acres embraced in one application.

7. The local officers will on receipt of applications note same upon the tract books of their office, and if the applications are not properly executed, or not corroborated, they will reject the same subject to the right of appeal. Applications found to be properly executed will be transmitted to the General Land Office with the monthly returns, accompanied in each case with a report as to the status of the land, and the existence of any objection to the offering of the lands for sale.

8. An application for sale under these instructions will not segregate the land from entry or other disposal, for such lands may be entered at any time prior to the receipt in the local land office of the letter authorizing the sale. Upon the receipt of such letter, the local officers will note thereon the time when it was received, and at once examine the records to see whether the lands, or any part thereof,

have been entered. They will note on the tract book, opposite such lands as are found to be clear, that sale has been authorized, giving the date of the letter. Such lands will then be considered segregated for the purpose of sale.

If the examination of the records show that all of the lands have been entered, the local officers will not promulgate the letter authorizing the sale, but will report the facts to this office, whereupon the letter authorizing the sale will be revoked. If a part of the land has been entered they will report such tracts to this office, and proceed as provided below as to the remainder.

The local officers will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered, and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice, and for the affidavit of the publisher to be filed in the local land office prior to the date of the sale. The register will also designate a newspaper as published nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the receiver, he must issue receipt therefor, and immediately return the money to the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

If on the day set for the sale the affidavit of the publisher, showing proper publication, has not been filed in the local land office, the register and receiver will report that fact to this office, and will not proceed with the sale.

9. Notice must be published once a week for five consecutive weeks (or thirty consecutive days, if in a daily paper) immediately prior to the date of sale, but a sufficient time should elapse between the date of last publication and date of sale to enable the affidavit of the publisher to be filed in the local land office. The notice must be published in the paper designated by the register as nearest the land described in the application. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The publisher of the newspaper must file in the local land office, prior to the date fixed for the sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by a copy of the notice published.

10. At the time and place fixed for the sale, the register or receiver will read the notice of sale, offer each body of land separately, and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale, as well as by the bidder in person. The register or receiver conducting the sale will

keep a record showing the names of the bidders, and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

The sale will be kept open for one hour after the time mentioned in the published notice. At the expiration of the hour, and after all bids have been offered, the local officers will declare the sale closed, and announce the name of the highest bidder, who will be declared the purchaser, and he must immediately deposit the amount bid by him with the receiver, and within ten days thereafter furnish evidence of citizenship, or of declaration of intention to become a citizen, nonmineral and nonsaline affidavit, Form 4-062, or nonsaline affidavit, Form 4-062a, as the case may require. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers.

11. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless located in the State of Missouri (act of March 2, 1889, 25 Stats., 854), but may again be offered for sale in the manner herein provided.

12. After each offering where the lands offered are *not* sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary.*

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AN ACT To amend an act entitled "An act to amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States," approved February twenty-sixth, eighteen hundred and ninety-five.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act of February twenty-sixth, eighteen hundred and ninety-five, entitled "An act to amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States," be, and the same is hereby, amended so as to read as follows:

"It shall be lawful for the Commissioner of the General Land Office to order into market and sell, at public auction at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents per acre, any isolated or disconnected tract or parcel of the public domain not exceeding

one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided*, That this act shall not defeat any vested right which has already attached under any pending entry or location."

Approved, June 27, 1906 (34 Stat., 517).

[Form 4-008 B.]

# APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

\_\_\_\_\_,  
\_\_\_\_\_, 19\_\_\_\_

To the Commissioner of the General Land Office:

\_\_\_\_\_, whose post-office address is \_\_\_\_\_, respectfully requests that the \_\_\_\_\_ of Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, be ordered into market and sold under the act of June 27, 1906 (34 Stats., 517), at public auction, all the surrounding lands having been entered or otherwise disposed of.

Applicant states that he \_\_\_\_\_

(Insert statement that affiant is a native-born or naturalized citizen, or has declared intention to become such, as the case may be. Record evidence of naturalization or declaration of intention must be furnished.)  
\_\_\_\_\_ citizen of the United States; that this land contains no salines, coal, or other minerals, and no stone except \_\_\_\_\_

\_\_\_\_\_ ; that there is no timber thereon except \_\_\_\_\_ trees of the \_\_\_\_\_ species, ranging from \_\_\_\_\_ inches to \_\_\_\_\_ feet in diameter, and aggregating about \_\_\_\_\_ feet stumpage measure, of the estimated value of \$\_\_\_\_\_; that the land is not occupied except by \_\_\_\_\_ of \_\_\_\_\_ post-office, who occupies and uses it for the purpose of \_\_\_\_\_, but does not claim the right of occupancy under any of the public land laws; that the land is chiefly valuable for \_\_\_\_\_, and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of \_\_\_\_\_, and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 160 acres. The lands heretofore purchased by him under said act are described as follows:

\_\_\_\_\_  
\_\_\_\_\_  
If this request is granted applicant agrees to have notice published at his expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tracts above described? If so, describe the land by section, township, and range.

Answer \_\_\_\_\_

Question 2. To what use do you intend to put the isolated tracts above described should you purchase same?

Answer \_\_\_\_\_

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tracts?

Answer \_\_\_\_\_

Question 4. Have you been requested by anyone to apply for the ordering of the tracts into market? If so, by whom?

Answer \_\_\_\_\_

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer \_\_\_\_\_

Question 6. Do you intend to appear at the sale of said tracts if ordered, and bid for same?

Answer \_\_\_\_\_

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the lands for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer \_\_\_\_\_

\_\_\_\_\_  
(Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the lands described by him, and the statements hereinbefore made are true to the best of our knowledge and belief.

\_\_\_\_\_  
(Sign here with full Christian name.)

\_\_\_\_\_  
(Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses, in my presence, before affiants affixed their signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by \_\_\_\_\_); that I

(P. O. address)

verily believe affiants to be credible persons, and the identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

\_\_\_\_\_  
(Official designation of officer.)

[Form 4-283 A.]

# NOTICE FOR PUBLICATION—ISOLATED TRACT.

## PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,

\_\_\_\_\_  
LAND OFFICE,

\_\_\_\_\_, 19\_\_

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the act of Congress approved June 27, 1906 (34 Stat., 517), pursuant to the application of \_\_\_\_\_, Serial No. \_\_\_\_\_, we will offer at public sale to the highest bidder, at \_\_\_\_\_ o'clock,

-----m., on the -----day of-----, next, at this office,  
the following tract of land:

-----

Any persons claiming adversely the above-described lands are advised to file  
their claims or objections on or before the time designated for sale.

-----  
Register.

-----  
Receiver.

**KINKAID ACTS—ADDITIONAL ENTRY—SECTION 2, ACT OF APRIL 28, 1904,  
AND SECTION 7, ACT OF MAY 29, 1908.**

**DEBOLT v. COEN.**

The fact that the owner of an original homestead has mortgaged the same does not disqualify him to make additional entry under section 2 of the act of April 28, 1904, as amended by section 7 of the act of May 29, 1908, where under the law of the State a mortgage does not divest the mortgagor of title or right of possession.

The term "own and occupy" in said sections, defining persons qualified to make additional entry thereunder, implies that the occupancy must be one of right as owner and that the ownership and occupancy of the original homestead shall continue for the full period of five years from date of the additional entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 6, 1910.* (J. R. W.)

Richard Coen appealed from your decision of December 31, 1909, affirming the action of the local office holding for cancellation Coen's entry for the N.  $\frac{1}{2}$  N.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 10, T. 31 N., R. 20 W., 6th P. M., Valentine, Nebraska.

April 8, 1901, Coen made original homestead entry for the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 3, same township, for which patent issued to him March 7, 1902. March 25, 1905, he entered the first above described land as additional to his original entry, under the act of April 28, 1904 (33 Stat., 547). May 7, 1909, Arthur Debolt filed affidavit of contest, alleging Coen's abandonment for more than six months and his failure to improve or cultivate the land. June 14, 1909, after due notice, hearing was had in which both parties participated. The evidence showed that Coen has lived on his original entry since November 18, 1894, cultivating about 40 acres and using the remainder for grazing. On the additional entry he put 15 acres into cultivation, set out one hundred apple trees, cared for a grove of cottonwoods already there, made three-quarters of a mile of two-wire fence, set out five hundred poplar cuttings, and planted some small fruit. The remainder of the additional entry he used for grazing. The value of improvements on the additional entry is about \$200 or \$250.



April 5, 1902, he mortgaged the land in his original entry to one Hart to secure \$350. December 9, 1904, foreclosure suit was begun resulting in a foreclosure decree May 2, 1905. He took stay of execution for nine months. May 7, 1906, the sheriff sold the land under the foreclosure decree and, after confirmation of sale October 3, 1906, conveyed the land, by deed, to Hart. Thereafter Coen remained in possession without paying taxes or rent. He improved his house at an expense of \$200. September 20, 1907, Hart conveyed the land to one Frank Blank, who conveyed to one Harrington March 3, 1909. Coen continuing in possession is explained by a negotiation with the agent of Hart to repurchase the property or, as he says, "redeem it," but he was unable to secure funds and nothing resulted from this negotiation. On these facts you canceled the entry upon two grounds:

1. That the mortgage was a conveyance subject to defeat by payment of the debt, and breach of the condition made the conveyance absolute as if absolute at the time so that Coen was not owner of his original entry at the time of making the additional.

2. That residence on the original entry permitted by section 2 of the acts of April 28, 1904, and May 29, 1908 (35 Stat., 465), as equivalent to residence on the additional, must be that of an owner or holder of the title, and, as Coen's title had been divested more than six months before the contest, he was in default as to residence.

The first ground was erroneous. By the law of Nebraska every instrument made for security of a payment of money is a mortgage simply and does not divest the mortgagor of title or right to possession. (Cobbe's Compiled Statutes 1909, Section 10855.)

The second ground involves interpretation of section 2 of the act of April 28, 1904, and the act of May 29, 1908. Both of these acts permit those who have entered land under the homestead laws—

who own and occupy the lands heretofore entered may . . . enter other lands contiguous to their homestead entry . . . and residence continued and improvements made upon the original homestead subsequent to the making of the additional entry shall be accepted as equivalent to actual residence and improvements made upon the additional land so entered, but final entry shall not be allowed to such additional lands until five years after the first entry of same.

The act of May 29, 1908, differed from that of April 28, 1904, only by adding the provision that improvements made on the original homestead should be equivalent to improvements made on the additional land, and the final entry should not be allowed until five years after the additional entry was made. This change was doubtless due to holding in the decision in *Levy Overman* (35 L. D., 613) that an entryman must place improvements on the additional entry to the value of \$1.25 per acre. In other words, the amendment per-

mitted improvement on the original entry to count as improvement of the additional entry.

The law uses the terms "own" and "occupy" which imply that the occupancy must be one of right as owner. *Libolt v. Snider* (35 L. D., 430); *Abold v. Meer* (35 L. D., 560). Coen was therefore qualified at the time he made entry notwithstanding his mortgage.

While the law does not require in express terms that he own and occupy the original homestead during the whole period of the additional entry, that necessarily is implied. The object of the act was to permit one having land in that semiarid region to enlarge his holding to an area deemed sufficient to make a remunerative farm or agricultural holding. The fact that title was not to be given until the end of five years from the additional entry and that residence on the original tract should be equivalent to residence on the additional, necessarily implies continued ownership of the original. It would be a strange departure from the unvaried rule in regard to homestead entries, if a man could hold a homestead entry and live as a mere tenant on other land that he did not own. Congress prescribed the rule that an entryman, at the time of additional entry, must be owner of and occupant of his original homestead and then permitted continued residence thereon to count as residence upon the additional tract which, with the original entry, made one farm holding. Nothing in the act indicates that Congress ever contemplated absolving the entryman from residing on his farm. It merely permitted residence on one part of his farm, to which he had title, to count for residence on the other part, which he held under the additional homestead law.

Your decision is affirmed.

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KINKAID ACTS—APRIL 28, 1904, MARCH 2, 1907, AND SEC. 7, ACT OF MAY 29, 1908.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 7, 1910.

*Registers and Receivers, United States Land Offices.*

SIRS: Section 7 of the act of Congress approved May 29, 1908 (35 Stat., 465), amended section 2 of the act of April 28, 1904 (33 Stat., 547); commonly known as the Kinkaid Act, to read as follows:

Sec. 2. That entrymen under the homestead laws of the United States within the territory above described who own and occupy the lands heretofore entered by them may, under the provisions of this act and subject to its conditions,

enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence continued and improvements made upon the original homestead, subsequent to the making of the additional entry, shall be accepted as equivalent to actual residence and improvements made upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same, except in favor of entrymen entitled to credit for military service.

This amendment did not affect sections 1 and 3 of the Kinkaid Act, which read as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after sixty days after the approval of this act entries made under the homestead laws in the State of Nebraska west and north of the following line, to wit: Beginning at a point on the boundary line between the States of South Dakota and Nebraska where the first guide meridian west of the sixth principal meridian strikes said boundary; thence running south along said guide meridian to its intersection with the fourth standard parallel north of the base line between the States of Nebraska and Kansas; thence west along said fourth standard parallel to its intersection with the second guide meridian west of the sixth principal meridian; thence south along said guide meridian to its intersection with the third standard parallel north of the said base line; thence west along said third standard parallel to its intersection with the range line between ranges twenty-five and twenty-six west of the sixth principal meridian; thence south along said line to its intersection with the second standard parallel north of the said base line; thence west on said standard parallel to its intersection with the range line between ranges thirty and thirty-one west; thence south along said line to its intersection with the boundary line between the States of Nebraska and Kansas, shall not exceed in area six hundred and forty acres, and shall be as nearly compact in form as possible, and in no event over two miles in extreme length: *Provided*, That there shall be excluded from the provisions of this act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said Secretary shall, prior to the date above mentioned, designate and exclude from entry under this act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this act any of the lands so excluded, which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid.

SEC. 3. That the fees and commissions on all entries under this act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price. That the commutation provisions of the homestead law shall not apply to entries under this act, and at the time of making final proof the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre included in his entry: *Provided*, That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed 640 acres: *Provided*, That any former homestead entryman who shall be entitled to an additional entry under section 2 of this act shall have for ninety days after the passage of this act the preferential right to make additional entry as provided in said section.

All general instructions heretofore issued under this act, and the instructions issued under the supplemental act of March 2, 1907 (34 Stat., 1224; 32 L. D., 670; 34 L. D., 87, and 546; 37 L. D., 225), are hereby modified and reissued as follows:

1. It is directed by the law that in that portion of the State of Nebraska lying west and north of the line described therein, which was marked in red ink upon maps transmitted with said circular, upon and after June 28, 1904, except for such lands as might be thereafter and prior to said date excluded under the proviso contained in the first section thereof, homestead entries may be made for and not to exceed 640 acres, the same to be in as nearly a compact form as possible, and must not in any event exceed 2 miles in extreme length.

2. Under the provisions of the second section, a person who within the described territory has made entry prior to May 29, 1908, under the homestead laws of the United States, and who now owns and occupies the lands theretofore entered by him, and is not otherwise disqualified, may make an additional entry of a quantity of land contiguous to his said homestead entry, which, added to the area of the original entry, shall make an aggregate area not to exceed 640 acres; and he will not be required to reside upon the additional land so entered, but residence continued, and improvements made upon the original homestead entry subsequent to the making of the additional entry will be accepted as equivalent to actual residence and improvements on the land covered by the additional entry. But residence either upon the original homestead or the additional land entered must be continued for the period of five years from the date of the additional entry, except that entrymen may claim and receive credit on that period for the length of their military service, not exceeding four years.

3. A person who has a homestead entry upon which final proof has not been submitted and who makes additional entry under the provisions of section 2 of the act, will be required to submit his final proof on the original entry within the statutory period therefor, and final proof upon the additional entry must also be submitted within the statutory period from date of that entry.

4. Such additional entry must be for contiguous lands and the tracts embraced therein must be in as compact a form as possible, and the extreme length of the combined entries must not in any event exceed 2 miles.

5. In accepting entries under this act compliance with the requirement thereof as to compactness of form should be determined by the relative location of the vacant and unappropriated lands, rather than by the quality and desirability of the desired tracts.

6. By the first proviso of section 3 any person who made a homestead entry either within the territory above described or elsewhere prior to his application for entry under this act, if no other disqualification exists, will be allowed to make an additional entry for a quantity of land which, added to the area of the land embraced in the former entry, shall not exceed 640 acres, but residence upon and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries. But the application of one who has an existing entry and seeks to make an additional entry under said proviso, can not be allowed unless he has either abandoned his former entry or has so perfected his right thereto as to be under no further obligation to reside thereon; and his qualifying status in these and other respects should be clearly set forth in his application.

7. Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

8. Upon final proof, which may be made after five years and within seven years from date of entry, the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre, and such proof must also show residence upon and cultivation of the land for the five-year period as in ordinary homestead entries, but credit for military service may be claimed and given under the supplemental act mentioned above.

9. In the making of final proofs the homestead-proof form will be used, modified when necessary in case of additional entries made under the provisions of section 2.

10. It is provided by section 3 that the fees and commissions on all entries under the act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price, viz: At the time the application is made \$14, and at the time of making final proof \$4, to be payable without regard to the area embraced in the entry.

11. In case the combined area of the subdivisions selected should, upon applying the rule of approximation thereto, be found to exceed in area the aggregate of 640 acres, the entryman will be required to pay the minimum price per acre for the excess in area.

12. Entries under this act are not subject to the commutation provisions of the homestead law.

13. In the second proviso of section 3 entrymen who had made their entries prior to April 28, 1904, were allowed a preferential right for ninety days thereafter to make the additional entry allowed by section 2 of the law.

14. The supplemental act, approved March 2, 1907 (34 Stat., 1224), reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all qualified entrymen who, during the period beginning on the twenty-eighth day of April, nineteen hundred and four, and ending on the twenty-eighth day of June, nineteen hundred and four, made homestead entry in the State of Nebraska within the area affected by an act entitled "An act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eighth, nineteen hundred and four, shall be entitled to all the benefits of said act as if their entries had been made prior or subsequent to the above-mentioned dates, subject to all existing rights.*

SEC. 2. That the benefits of military service in the army or navy of the United States granted under the homestead laws shall apply to entries made under the aforesaid act, approved April twenty-eighth, nineteen hundred and four, and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions hereof.

SEC. 3. That within the territory described in said act approved April twenty-eighth, nineteen hundred and four, it shall be lawful for the Secretary of the Interior to order into market and sell under the provisions of the laws providing for the sale of isolated or disconnected tracts or parcels of land any isolated or disconnected tract not exceeding three quarter sections in area: *Provided*, That not more than three quarter sections shall be sold to any one person.

#### ISOLATED OR DISCONNECTED TRACTS.

15. The sale of isolated tracts within the area affected by the terms of this act is to be governed by the provisions of the act of June 27, 1906 (34 Stat., 517), as amended by section 3 of said act of March 2, 1907, and all sales shall be made in the manner and form herein-after provided.

16. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated.

17. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts, the area of which, when added to the area now applied for, will exceed approximately 480 acres, and that he is a citizen of the United States or has declared his intention to become such. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

18. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the application are situated.

19. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

20. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands, the area of which, when added to the area applied for, shall exceed approximately 480 acres. No sale will be authorized for more than approximately 480 acres embraced in one application.

21. The local officers will on receipt of applications note same upon the tract books of their office, and if the applications are not properly executed, or not corroborated, they will reject the same subject to the right of appeal. Applications found to be properly executed will be transmitted to the General Land Office with the monthly returns, accompanied in each case with a report as to the status of the land and the existence of any objection to the offering of the lands for sale.

22. An application for sale under these instructions will not segregate the land from entry or other disposal, for such lands may be entered at any time prior to the receipt in the local land office of the letter authorizing the sale. Upon the receipt of such letter the local officers will note thereon the time when it was received and at once examine the records to see whether the lands, or any part thereof, have been entered. They will note on the tract book, opposite such lands as are found to be clear, that sale has been authorized, giving the date of the letter. Such lands will then be considered segregated for the purpose of sale.

If the examination of the records shows that all of the lands have been entered, the local officers will not promulgate the letter authorizing the sale, but will report the facts to this office, whereupon the letter authorizing the sale will be revoked. If a part of the land has been entered they will report such tracts to this office and proceed as provided below as to the remainder:

The local officers will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice and for the affidavit of the publisher to be filed in the local land office prior to the date of the sale. The register will also designate a newspaper as

published nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the receiver he must issue receipt therefor and immediately return the money to the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

If on the day set for the sale the affidavit of the publisher, showing proper publication, has not been filed in the local land office, the register and receiver will report that fact to this office and will not proceed with the sale.

23. Notice must be published once a week for five consecutive weeks (or thirty consecutive days, if in a daily paper), immediately prior to date of sale, but a sufficient time should elapse between the date of last publication and date of sale to enable the affidavit of the publisher to be filed in the local land office. The notice must be published in the paper designated by the register as nearest the land described in the application. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The publisher of the newspaper must file in the local land office, prior to the date fixed for sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by copy of the notice published.

24. At the time and place fixed for the sale, the register or receiver will read the notice of sale, offer each body of land separately, and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale, as well as by the bidder in person. The register or receiver conducting the sale will keep a record showing the names of the bidders, and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

The sale will be kept open for one hour after the time mentioned in the published notice. At the expiration of the hour, and after all bids have been offered, the local officers will declare the sale closed, and announce the name of the highest bidder, who will be declared the purchaser, and he must immediately deposit the amount bid by him with the receiver, and within ten days thereafter furnish evidence of citizenship, or of declaration of intention to become a citizen, nonmineral and nonsaline affidavit, Form 4-062, and purchaser's affidavit, Form 4-093. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers.



25. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private cash entry (act of Mar. 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided.

26. After each offering where the lands offered are *not* sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved, June 7, 1910.

R. A. BALLINGER,  
*Secretary.*

[Form 4-008C.]

# APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

\_\_\_\_\_, 19\_\_\_\_.

To the Commissioner of the General Land Office:

\_\_\_\_\_ whose post-office address is \_\_\_\_\_

\_\_\_\_\_, requests that the \_\_\_\_\_  
of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, be ordered into market and  
sold under the acts of June 27, 1906 (34 Stat., 517), and March 2, 1907 (34  
Stat., 1224), at public auction, all the surrounding lands having been entered or  
otherwise disposed of. Applicant states that he \_\_\_\_\_

(Insert statement that affiant is a

\_\_\_\_\_ native-born or naturalized citizen, or has declared intention to become such, as the case  
may be. Record evidence of naturalization or declaration of intention must be furnished.)  
citizen of the United States; that this land contains no salines, coal, or other  
minerals, and no stone except \_\_\_\_\_

\_\_\_\_\_ ; that there is no  
(State amount and character.)

timber thereon except \_\_\_\_\_ trees of the \_\_\_\_\_ species, ranging  
from \_\_\_\_\_ inches to \_\_\_\_\_ feet in diameter, and aggregating about \_\_\_\_\_  
feet stumpage measure, of the estimated value of \$ \_\_\_\_\_ ; that the land is  
not occupied except by \_\_\_\_\_ of \_\_\_\_\_  
post-office, who occupies and uses it for the purpose of \_\_\_\_\_,  
but does not claim the right of occupancy under any of the public land laws;

that the land is chiefly valuable for-----  
 and that applicant desires to purchase same for his own individual use and  
 actual occupation for the purpose of-----and not  
 for speculative purposes; that he has not heretofore purchased public lands  
 sold as isolated tracts, the area of which when added to the area herein applied  
 for will exceed approximately 480 acres. The lands heretofore purchased by  
 him under said act are described as follows:-----  
 -----

If this request is granted, applicant agrees to have notice published at his  
 expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tracts above described?  
 If so, describe the land by section, township, and range.

Answer -----

Question 2. To what use do you intend to put the isolated tracts above de-  
 scribed should you purchase same?

Answer -----

Question 3. If you are not the owner of adjoining land, do you intend to  
 reside upon or cultivate the isolated tracts?

Answer -----

Question 4. Have you been requested by anyone to apply for the ordering of  
 the tracts into market? If so, by whom?

Answer -----

Question 5. Are you acting as agent for any person or persons or directly or  
 indirectly for or in behalf of any person other than yourself in making said  
 application?

Answer -----

Question 6. Do you intend to appear at the sale of said tracts if ordered, and  
 bid for same?

Answer -----

Question 7. Have you any agreement or understanding, expressed or implied,  
 with any other person or persons that you are to bid upon or purchase the lands  
 for them or in their behalf, or have you agreed to absent yourself from the sale  
 or refrain from bidding so that they may acquire title to the land?

Answer -----

-----  
 (Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the lands  
 described by him, and the statements hereinbefore made are true to the best of  
 our knowledge and belief.

-----  
 (Sign here with full Christian name.)

-----  
 (Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were  
 read to or by the above-named applicant and witnesses, in my presence, before  
 affiants affixed their signatures thereto; that affiants are to me personally  
 known (or have been satisfactorily identified before me by-----,  
 -----); that I verily believe affiants to be credible persons, and the  
 (P. O. address.)

identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
 \_\_\_\_\_  
 (Official designation of officer.)

[Form 4—283b.]

# NOTICE FOR PUBLICATION—ISOLATED TRACT.

## PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,  
 \_\_\_\_\_ LAND OFFICE,  
 \_\_\_\_\_, 19\_\_.

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the acts of Congress, approved June 27, 1906 (34 Stat., 517), and March 2, 1907 (34 Stat., 1224), pursuant to the application of \_\_\_\_\_, Serial No. \_\_\_\_\_, we will offer at public sale to the highest bidder, at \_\_\_\_\_ o'clock, \_\_\_\_ m., on the \_\_\_\_\_ day of \_\_\_\_\_ next, at this office, the following tract of land: \_\_\_\_\_

Any persons claiming adversely the above-described lands are advised to file their claims or objections on or before the time designated for sale.

\_\_\_\_\_  
 (Register.)

\_\_\_\_\_  
 (Receiver.)

## RIGHT OF WAY—RESERVOIR SITE—SECTIONS 18-21, ACT OF MARCH 3, 1891.

### DE WEESE *v.* HENRY INVESTMENT COMPANY.

Rights of way for reservoir sites under the act of March 3, 1891, may be acquired by actual occupancy and development on the ground; and a mere application and map, unless followed with reasonable diligence by actual development and use, is no bar to appropriation of the site by another who proceeds with diligence to development and utilization thereof.

*First Assistant Secretary Pierce to the Commissioner of the General*  
 (F. W. C.) *Land Office, June 8, 1910.* (J. R. W.)

The Henry Investment Company appealed from your decision of November 13, 1909, approving application of Dall De Weese for a reservoir site known as the Grape Creek Reservoir and denying approval of the application of the Henry Investment Company for the same reservoir site.

The Grape Creek Reservoir Site was reserved by the United States under acts of October 2, 1888 (25 Stat., 505, 526), and August 30, 1890 (26 Stat., 371, 391), and included parts of sections 19, 20, 21, 28, 29, 30 and 31, T. 21 S., R. 28 W.; Sec. 7, T. 22 S., R. 72 W.; sections 24, 26, 35 and 36, T. 21 S., R. 73 W., and sections 1, 2 and 12, T. 22 S., R. 73 W., all 6th P. M., Pueblo, Colorado.

December 1, 1897, the Secretary of the Interior approved a map filed by George E. Ross-Lewin and Henry R. Holbrook under acts of March 3, 1891 (26 Stat., 1095), and February 26, 1897 (29 Stat., 599).

December 4, 1902, the Henry Investment Company (hereinafter styled company) applied for right of way for said reservoir site under act of March 3, 1891, *supra*, filing therewith a petition for institution of suit by the United States to cancel and forfeit the Ross-Lewin-Holbrook approval on the ground that no part of the reservoir had been completed within five years after date of such approval as required by Sec. 20 of the act under which it was granted. March 27, 1903, the company filed its proofs of organization, which were accepted for filing in connection with its application for another reservoir site called the Chaquaqua. August 13, 1903, you submitted the company's application to the Secretary with recommendation that its map be approved. September 4, 1903, the Secretary remanded the case and directed that the petition for forfeiture of the former grant to Ross-Lewin-Holbrook be regularly served on the proper parties with view to suit to forfeit their rights if the facts warranted such action. This direction was complied with by the company and suit was brought by counsel employed by the company on behalf of the United States, which proceeding pended until the May term, 1907, United States Circuit Court, Colorado, sitting at Denver, when a decree of forfeiture was rendered.

April 2, 1907, De Weese filed application for right of way for De Weese Reservoir No. 1, which you rejected April 6, 1907, for conflict with the company's pending application, and April 27, 1907, De Weese appealed. With his appeal you transmitted map and field notes in duplicate and other papers filed by De Weese in your office with his application for right of way for De Weese Reservoir No. 1, covering parts of sections 19, 20, 21, 30 and 31, T. 21 S., R. 72 W. No action appears to have been taken on De Weese's appeal.

August 30, 1907, you transmitted a protest filed by De Weese against allowance of the company's application. February 26, 1908, you transmitted another application by De Weese for right of way for De Weese Reservoir Site No. 1 according to his second amended survey and also his amended protest against allowance of the company's application. According to this amended survey the dam site is about 8,000 feet further down Grape Creek than in his original

application, and the area of the reservoir is much extended. At the same time De Weese filed a copy of the court's decree cancelling the Ross-Lewin-Holbrook right. The Department, October 20, 1908, found the decree sufficient to revest the United States with full title to the land and remanded the case to you "for such action as seems necessary upon the application of the Henry Investment Company and said protest and application of Dall De Weese." November 4, 1908, you advised the local office of forfeiture of the Ross-Lewin-Holbrook right, and directed notation on the local records. At the same time you directed a hearing upon De Weese's protest to find the merits of the respective applications. March, 1909, hearing was had at the local office in which both parties appeared aided by counsel and De Weese submitted oral testimony. The company offered no oral testimony but filed in evidence the map and papers comprising its application. November 13, 1909, the local office found favorably to De Weese, the protestant, and recommended rejection of the company's application and approval of De Weese's application. On the company's appeal you affirmed that action. The evidence shows that in 1894 De Weese visited and examined the reservoir site, and, finding it had been surveyed and withdrawn by the government, he acquired 1250 acres of land in T. 19 S., R. 70 W., for purposes of reclamation with water to be drawn from the government reservoir. He planned and constructed a diverting dam in Grape Creek about twenty-six miles below the government reservoir site and constructed a canal leading from the dam to the lands so purchased, intending to reclaim them with water to be obtained from the proposed reservoir. The land was the nearest reclaimable and irrigable land to the reservoir site. Long before this time the normal summer flow of Grape Creek had been appropriated by others and De Weese's project depended on conservation of flood waters then expected to be done by the government.

By act of February 26, 1897 (29 Stat., 599), the Government authorized development by the States of any reservoir site it had previously reserved. In October, 1897, De Weese went to the reservoir site intending to survey and locate it but found it had been appropriated by Ross-Lewin and Holbrook. In December, 1900, he again visited the reservoir site and found the grantees had done no construction work, but had apparently abandoned it, whereupon De Weese purchased of Foster the 160-acre tract at the dam site, paying \$2300. He then took possession and posted notice to that effect and employed a man to live thereon and look after his interests. October, 1901, De Weese began survey of the reservoir site and did preliminary work to construction of a dam. He completed the survey in spring of 1902, and June 12th filed with the State Engineer a map of De Weese reservoir, with specifications of his proposed dam.

July 5th he filed map of the reservoir and proposed dam for record in the County Clerk's office. During 1902 to 1905, inclusive, each year, he continued work on the reservoir site, bought more of the patented lands within its area, built a dam, and in 1905 one thousand acres in T. 19 S., R. 70 W. were irrigated with conserved flood waters stored in the De Weese reservoir. This reservoir covered patented lands with exception of a few acres of public land and had a storage capacity of 1700 acre feet. It was maintained in efficiency and used in every year from 1905 to the present time. The lands reclaimed are now occupied by about two hundred and eighty-five families and are covered with bearing orchards mostly in private ownership.

The De Weese reservoir No. 1 is a proposed extension of the De Weese Reservoir, to be made by raising and strengthening the dam from its present elevation of fifty-five feet to a proposed elevation of one hundred and forty feet. If so extended there would be approximately one thousand acres of public land and thirteen hundred acres patented land within the flowage contour. About seven hundred acres of the thirteen hundred patented lands are owned by De Weese.

The De Weese Ditch and Reservoir Company, organized by De Weese, of which he is President and largest stockholder, took over the De Weese Reservoir and De Weese Dye Ditch. In January, 1907, De Weese made agreement with this company to enlarge the De Weese Reservoir theretofore constructed by constructing the De Weese Reservoir No. 1 above mentioned. He also entered into an arrangement for an agreement with the Denver and Rio Grande Railway Company to flood part of its right of way through the proposed enlarged reservoir. He also agreed with owners of arid lands in T. 19 S., R. 70 W., and others eastward thereof, to furnish water conserved by the proposed enlarged reservoir for reclamation of their lands. In 1907 and 1908 he surveyed and perfected applications for right of way for other reservoir sites lower down Grape Creek, diverting dams, tunnels, ditches, conduits, and works subsidiary to and depending upon the proposed enlarged reservoir. Some of these applications have been approved. This is all shown affirmatively in evidence.

On the other hand, it does not appear that the company has done any work on the reservoir site covered by its application, or has acquired title to any of the patented lands within the site, or title to any of the normal flow or flood water of Grape Creek, or has acquired title to any lands which could be irrigated from such proposed work, or has arrived at any adjustment or arrangement with the railway company to flood its right of way. The latter fact is a matter of perhaps

small consequence as the railway company has abandoned its right of way at the point where it would be flooded.

De Weese offered evidence tending to show that the company never made any actual survey of the reservoir site or caused one to be made, but that its map filed was a mere copy of the map filed by Ross-Lewin and Holbrook. Comparison of the map and field notes filed by the company show they are an identical copy of that of Ross-Lewin and Holbrook. The surveyor's affidavit on the company's map states that its survey was begun November 8 and completed November 29, 1902. At that time De Weese, by his resident tenant at the dam site, was in possession and he had all the time one or more employes on the land who must have known of the survey had one been made. The record un rebutted shows *prima facie* that the company never in fact made a survey, and the identity of the maps and field notes lends strong corroborating support to the charge that the Ross-Lewin and Holbrook map and field notes were merely copied by the company without making any survey of the site.

The Ross-Lewin-Holbrook proposed dam was located on the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 20, T. 21 S., R. 72 W., with a proposed elevation of one hundred and forty feet to cover 3220 $\frac{1}{2}$  acres, with a storage capacity of 128,800 acre feet. The company's map shows its dam in the same place with the same height, area and capacity. The dam actually constructed by De Weese is in the NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  Sec. 20, and the reservoir created has 1700 acre feet capacity. The map of De Weese's first application for enlargement contemplated elevating the original dam made to 140 feet. The map with his second application shows the proposed dam to be on the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 15, T. 21 S., R. 72 W., of a height of 175 feet, creating a reservoir of 97901.98 acre feet. You found that the company is the prior applicant and was instrumental in securing judicial declaration of forfeiture of the Ross-Lewin-Holbrook right; that this is the extent of its activity. On the other hand, De Weese took possession of the site before the company's application and has been in possession ever since; that he made surveys and had done considerable work, building a dam and constructing a reservoir that covered part of the site applied for by the company; that he proceeded in belief that no proceedings were necessary to revoke or cancel the grant made to Ross-Lewin and Holbrook, but that the lapse of time alone worked a complete forfeiture.

You held that as a general proposition one proceeding under the land laws first in time is ordinarily first in right, but that a mere application, unapproved and uncoupled with any other activity, vests no right or interest in the land covered by the application; that no right exists until he had done everything the law requires him to do and presents proof of it satisfactory to the land department.

There is no error in so holding, but the company insists that activity on the land would be a trespass prior to cancellation of the Ross-Lewin-Holbrook grant; that presentation of its map and notes of survey, good on their face, give it a right prior to any later applicant; that activity on the ground is not required until approval of the map.

The statute evidently contemplates something more than the filing of a map good on its face—some actual activity on the ground. The act was intended to apply to works already done as well as to those proposed. The words of the grant are that:

The right of way through the public lands . . . is hereby granted to any canal or ditch company . . . which shall have filed, or may hereafter file, with the Secretary of the Interior, a copy of its articles of incorporation, and due proof of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canals and its laterals, and fifty feet on each side of the marginal limits thereof.

The words "occupied" and "marginal limits" indicate something more substantial than a map or mere proposed constructions. By section 19 any company desiring benefits of the act were required "within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof," to file a map of "its canal or ditch and reservoir." This also by the words canal and reservoir implies something more than a paper project merely. To this is added the proviso that—

If any section of said canal or ditch shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted portion of said canal, ditch or reservoir to the extent that the same is not completed at the date of the forfeiture.

The act by its fair intendment and construction authorizes any citizen or corporation of the United States proposing to construct works of this character to go upon and occupy public land. It is a license held out to every qualified person, and action under it in the way of surveys, or even of constructions, are not trespasses. The promise is held out to all such persons that their rights shall be assured to them. The act is in terms like that granting rights of way to railroad companies, March 3, 1875 (18 Stat., 482). Both acts are float grants, not attached to the land or to any particular land until an act termed in the statute "location," which means some visible thing actually done on the land fixing the rights of way and limits of the right claimed.

It is not intended by the act that paper applications, unaccompanied by proof of good faith by works, shall tie up a right of way across public lands against appropriation by any other equally qualified applicant more diligent. It was held in Dakota Central Rail-



road Company *v.* Downey (8 L. D., 115) that the grant of right of way to a railroad company does not attach until there is a "fixity of location upon the ground," citing decisions of the Supreme Court to that effect. The right may be obtained by construction without filing of a map at all. John B. Wilson (27 L. D., 316). The two acts are similar and are to have like construction. Hamilton Pope (28 L. D., 402, 403). The filing of a map is requisite only to protect the grantee from claims by other parties. Battlement Reservoir Company (29 L. D., 112). The grant is obtained by force of the statute and some active work. No one has right to tie up and exclude from appropriation by others a tract of public land desired to be utilized in furtherance of public utilities.

In *Anderson v. Spencer* (38 L. D., 338) it was held that where two parties were active in the field, the first applying being the second in point of activity, neither being dilatory, the first in activity was the first in right. In that case it was also held that the right—may not only be initiated by making of a survey, but vested rights may be secured by the completion of such survey followed by actual construction upon the ground, so that under the act of March 3, 1891, rights may be secured by the diligent prosecution of field work, without reference to permissible procedure before the land department looking toward the approval of such maps of rights of way.

In the light of these authorities there can be no question of the priority of De Weese. From the beginning of his enterprise, at least as early as December, 1900, he has constantly shown activity and good faith in endeavoring to utilize the flood waters of the Grape Creek drainage area. The State has recognized such appropriation of waters and approved his maps. The Department concurs in your finding and decision that his application should be approved and that of the Henry Company should be denied.

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DECOURCEY *v.* VANDEVERT.

Motion for review of departmental decision of February 17, 1910, 38 L. D., 457, denied by First Assistant Secretary Pierce, June 9, 1910.

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ENLARGED HOMESTEAD—DESIGNATION—ENTRY.

THEODORE MOTT.

A designation or classification of lands under the enlarged homestead act is not necessarily conclusive; but an entry made on the strength of such designation should not be canceled in the absence of a showing of bad faith, fraud, or failure to comply with law—especially in the absence of a clear and definite showing that the land is "susceptible of successful irrigation at a reasonable cost from any known source of water supply."

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 10, 1910.* (C. J. G.)

An appeal has been filed by Theodore Mott from the decision of your office of February 19, 1910, holding for cancellation his homestead entry 04080, made November 9, 1909, under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), for the SW.  $\frac{1}{4}$  of Sec. 26, T. 7 N., R. 28 E., as additional to original homestead entry 15473, made by him September 13, 1907, for the SE.  $\frac{1}{4}$  of said Sec. 26, in the Walla Walla, Washington, land district.

The lands in township 7 north, range 28 east, were designated, April 27, 1909, as coming within the provisions of the enlarged homestead act, the same not being "susceptible of successful irrigation at a reasonable cost from any known source of water supply."

The designation of April 27, 1909, was canceled November 19, 1909, on recommendation of the Director of the Geological Survey, based upon report of a Survey Engineer "indicating" that the lands in township 7 north, range 28 east, "are susceptible of irrigation by a long, high line canal and the storage of water on a distant river."

In pursuance of such cancellation, your office on December 2, 1909, directed the local officers to make the proper notations on their records and to call upon any affected entrymen to show cause why their entries should not be canceled as to any excess over one hundred and sixty acres, and to notify them that they would be allowed to elect which one hundred and sixty acres they would retain.

The local officers on January 10, 1910, transmitted an affidavit by Mott in which he stated that since the date of his original entry for the SE.  $\frac{1}{4}$  of Sec. 26, he continued to reside on said land and to make improvements thereon in good faith; that prior to making his additional entry for the SW.  $\frac{1}{4}$  of Sec. 26, the tract was held by one Emory Owen as a desert-land claim; that upon being advised that said tract was subject to additional entry under the enlarged homestead act, he purchased the relinquishment and improvements of Owen, paying a valuable consideration therefor; that there is a fence around the entire tract, a well twenty-five feet deep thereon, and that by lowering said well fifteen feet he believes he will be able to secure a good supply of water for domestic purposes.

It was further stated by Mott that the land embraced in both his original and additional entries is of a semi-arid character, which can only be successfully cultivated by dry farming methods, and that under present conditions wheat is the only crop that can be sown with any prospect of remunerative return; that he knows of no feasible method of irrigating this land, either by Government projects or private enterprise, on account of the high elevation of this land above the Columbia River and all known sources of water supply for

irrigation; that to cancel any part of his entries would work a hardship and cause him a loss of \$500.

Mott elected in case one of his entries must be canceled to retain and hold his original entry, but asked that both entries be allowed to remain intact, subject to showing compliance with law.

The enlarged homestead act provides in section one thereof:

That no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

Section 3 of the act reads:

That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

At the date of this act Mott was a homestead entryman who had not submitted final proof. In pursuance of said act, the land subsequently embraced in his additional entry was designated as being of the character coming within its provisions, and, on the strength of such designations, said additional entry was applied for and allowed. The designation was subsequently canceled upon report indicating that the land is susceptible of irrigation, albeit by "a long, high canal and the storage of water on a distant river." As a result of this action Mott's entry has been held for cancellation by your office.

In the case of Web Green, May 4, 1910 (38 L. D., 586), construing section 6 of the enlarged homestead act, which section authorizes the designation of any tracts of land in the State of Utah not having upon them "such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible," it was held, among other things:

While it is believed that a designation or classification of lands under the act involved is not necessarily conclusive, nevertheless, I am of opinion that where entry is made under the provisions of section six, upon the faith and in full reliance upon the correctness of the designation of the lands as falling within the class as prescribed by law, such designation or classification should not thereafter be modified to the injury of any one who in good faith has acted upon such designation. The fact that certain entrymen have secured water upon lands so classified, would probably constitute a good reason for reexamination of the lands included within the area designated, with a view to reclassification, such reclassification, however, it would seem should be restricted to lands which have not been entered upon the faith of the former designation.

\* \* \* \* \*

Inasmuch as these designations or classifications are made at the discretion of the Secretary of the Interior, I should not be disposed to change the classification or designation of any lands which had been entered in good faith under former designations.

By analogy to the foregoing, it is not believed after land has once been designated as coming within the provisions of section 3 of the enlarged homestead act, and entry has been made thereof on the strength of such designation, that the entry should thereafter be canceled in the absence of a showing of bad faith, fraud, or failure to comply with law; certainly not on the mere physical possibility that the land is susceptible of irrigation without a corresponding showing that such irrigation can be accomplished at a reasonable cost, as contemplated by the act. However, as to lands that have not been entered, the effect of the canceled designation may, and should, very properly apply.

The decision of your office herein is reversed, and, if there be no other objection, the additional entry of Mott will remain intact, subject to compliance with law.

#### CLASSIFICATION AND VALUATION OF COAL LANDS.

##### REGULATIONS.<sup>a</sup>

DEPARTMENT OF THE INTERIOR,

UNITED STATES GEOLOGICAL SURVEY,

Washington, D. C., June 12, 1909.

THE HONORABLE, THE SECRETARY OF THE INTERIOR.

SIR: I respectfully recommend that the regulations regarding the classification and valuation of coal lands, approved by you on April 10, 1909 (37 L. D., 653), be modified by the addition to *paragraph 6* of the following words: "*and a graded allowance may be made for increasing depth with the same restriction.*"

Very respectfully,

GEO. OTIS SMITH, *Director.*

Approved June 12, 1909:

R. A. BALLINGER, *Secretary.*

#### ENLARGED HOMESTEAD—ADDITIONAL—SECTION 3, ACT OF FEBRUARY 19, 1909.

LORING R. REYNOLDS.

One who makes additional entry for less than the area he is entitled to take under section 3 of the enlarged homestead act of February 19, 1909, may be permitted to enlarge his entry, where it is clearly shown that he did not thereby intend to exhaust his right and took prompt action looking to amendment of the entry by the addition of adjoining land.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 14, 1910.* (J. H. T.)

Loring R. Reynolds has appealed from your decision of December 27, 1909, rejecting his application for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 14, T. 5 S.,

<sup>a</sup> Omitted from Volume 38.

R. 48 W., 6th P. M., as an amendment or enlargement of his additional homestead entry for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , said section, made May 12, 1909, under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639).

May 21, 1906, Reynolds made homestead entry for the SE.  $\frac{1}{4}$ , Sec. 11, T. 5 S., R. 48 W., Sterling, Colorado, land district. You denied the application to amend the said additional entry for the reason that the land he now applies for was subject to entry and might have been taken at the time he made the said additional entry. Upon appeal the applicant has made a showing more full and complete than the case appeared at the time your decision was rendered. He states that:

At the time he made the said additional entry, he started a contest against the northwest quarter of said section but was unable to make proof in support of the contest solely because the hearing was set too far away from the residence of any witnesses knowing the facts, and came on at the busiest time of the year in midharvest when he could not possibly get any witnesses to attend the hearing at any price; that Mr. A. A. Williams, United States Commissioner at Cope, Colorado, advised him that it would be better and more expeditious to start a new contest than to try to get a continuance of the case on those grounds; that therefore he applied to enter another contest against the land, having made said application before the said United States Commissioner; that said application was returned by the local officers because the said commissioner had omitted to impress his seal thereon and was returned to him for correction, and that while said application was *in transitu* in the mails he was anticipated by another applicant who was permitted to institute a prior contest on said land; that while said S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  is very inferior land, it will nevertheless be of great benefit to him for pasture as he must have livestock for the purpose of successful farming and to maintain himself upon the land he has.

The act under consideration is, in some respects, similar to the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid act, and the rules applied under that act in cases of amendment or enlargement of entries thereunder should be considered in adjudicating such applications under the enlarged homestead act. In the case of James Dinan (35 L. D., 102) it was held that (syllabus):

An entryman under the act of April 28, 1904, who fails to take the full quantity of land he is entitled to enter, for the reason that there are at that time no other adjoining unappropriated public lands subject to entry, may, if other adjoining lands subsequently become vacant, enlarge his former entry to the full area permitted by the statute, by including contiguous tracts in and as a part thereof, regardless of whether at the time of his original entry he contemplated taking those particular tracts if they should subsequently become vacant, provided it be satisfactorily established that he did not at the time of making the original entry intend thereby to exhaust the right conferred by the statute.

It was further stated therein, *inter alia*, that:

The statute permits entry to be made of a maximum quantity of land and so long as an entry made for a less amount is *unperfected* and *incomplete* and no adverse rights have intervened, applications of this character should not be

restricted by narrow rules as against those who in good faith are attempting to establish and maintain a home on the public lands. A liberal interpretation is more in keeping with the proper construction of a benevolent statute. (Josiah Cox, 27 L. D., 389, 390.) Such a one is the act of April 28, 1904, *supra*.

The rule should not be carried beyond reasonable limits nor invoked to protect claims not supported by equity and justice. Neither should it be so inflexible as to defeat meritorious claims. In a word, it should be purely equitable and its application should rest "upon the facts and circumstances surrounding each particular case." (Green Piggott, 34 L. D., 573, 574.)

The applicant in this case has no strict legal right which he may insist upon to amend or enlarge his additional entry, as there is no statute specifically granting such right in a case of this kind. If allowed at all it must be upon principles of equity and justice independently of specific statutory provisions. The circular of April 22, 1909 (37 L. D., 655), recognizes that supervisory authority is vested in the Secretary of the Interior to allow amendments not directly provided for by statute. The same doctrine is also found in numerous departmental decisions. See case of Henry Hookstra (34 L. D., 690) and cases therein cited. No hard and fast rule can well be laid down to govern in all respects the application of this equitable and supervisory power. Its application must necessarily depend upon the facts and circumstances appertaining to each particular case.

In this case it clearly appears that claimant did not at the time he made his additional entry intend to exhaust his entire right of entry, because he at that time instituted contest against an adjoining entry with a view to entering 80 acres thereof as a part of his additional entry. The fact that he failed to prosecute the contest to successful conclusion does not, in view of his explanations, cast doubt upon his original intentions. If he had pursued the contest and procured cancellation of the entry he would clearly have been entitled to amend or enlarge his entry, under the decisions above cited, if it appeared that the rule requiring such entries to be reasonably compact would not have been thereby violated. But the land now applied for will render the entry more compact, and as the same is vacant and no adverse claim is shown, no good reason is seen for denying the amendment as applied for, especially in view of the prompt action taken in filing the application. It is therefore directed that the amendment be allowed if the land is of the character subject to entry under the act.

Your decision is accordingly reversed and the papers are transmitted herewith.

SELECTION OF LANDS BY STATES AND TERRITORIES UNDER GRANTS  
FOR EDUCATIONAL AND OTHER PURPOSES.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., June 23, 1910.*

1. All lands selected must be from the unappropriated nonmineral surveyed public land, within the State, or Territory, making the selection, and their nonmineral character must be shown by the affidavit of some responsible party, having and testifying to a personal knowledge of the land, and shall apply to each smallest legal subdivision of land selected.

2. The selections in any one list, under special grants, or grants in quantity, should not exceed 6,400 acres, and the selections in any one list of indemnity school lands must not in the aggregate exceed 640 acres.

3. All lists of indemnity school lands must be prepared so that each selected tract will correspond in area with the base tract, and separate base or bases must be assigned to each smallest legal subdivision of land selected.

4. The assignment of a portion of the smallest legal subdivision of a school section as the basis, in whole or in part, for indemnity selections, is permitted; but such assignment is an election by the State or Territory to take indemnity for the entire subdivision, and is a waiver of its right to such subdivision, and any remaining balance must be used for future selections.

5. The cause of the loss for which indemnity is selected must be specifically stated, whether by entry, reservation, the mineral character of the land, or the fractional condition of the township.

6. The selecting agent must file with each list of selections of indemnity school lands a certificate, showing that indemnity has not previously been granted for the assigned base lands, and that no previous selection is pending for such assigned base; and with each list of selections of lands under quantity or special grants, a certificate that the selections and those pending, together with those approved, do not exceed the total amount granted for the purpose stated.

7. Where indemnity is sought for school lands in place, because of their inclusion within any Indian, military, or other reservation, the list of selections must, in every case, be accompanied by a certificate of the officer, or officers, charged with the care and disposal of school lands, that the State has not previously sold, or disposed of, or contracted to sell, or dispose of, any of said lands used as bases, or any part thereof; that the said lands are not in the possession of, or subject to the claim of any third party, under any law or permission of the

State, or Territory; and, within three months after the filing of any such list of selections, the State, or Territory, must, in addition, file a certificate from the recorder of deeds, or official custodian of the records of transfers of real estate, in the proper county, or from a reliable and responsible abstractor, or abstract company, that no instrument purporting to convey, or in any way encumber, the title to any of said lands used as bases, is of record, or on file, in the office of such custodian, and upon the report of the local officers of the failure of the State to file such certificate within the required time, any selection upon such base lands may be canceled without previous notice. No certificate from an abstractor, or abstract company, will be accepted until approval by the Commissioner of the General Land Office of a favorable report of the Chief of Field Division, or United States district attorney whose division or district embraces the lands in question, as to the reliability and responsibility of such abstractor or company.

8. The legal fees required by law must accompany all lists of selections.

No more than one number must be given to any list of selections, notwithstanding it may contain more than one selection.

9. Notice of selection of *all lands* must be given by publication once a week for five successive weeks in a newspaper of general circulation in the county where the lands are located, the paper to be designated by the register.

10. Notices for publication will be prepared by the register at the time of the acceptance of the selections, and will be transmitted by registered mail to the proper state or territorial official for publication in the paper or papers designated, and a copy of such notice shall also be posted by the register in a conspicuous place in his office and remain so posted until the expiration of time allowed for the submission of proof of publication.

To save expense, the register may embrace two or more lists in one publication when it can be done consistently with the requirement of publication in a newspaper of general circulation in the county where the land is situated.

The published notice will embrace only the selected lands described by the largest legal subdivisions embraced in the separate lists, care being taken to avoid repetition of numbers of sections, townships, and ranges.

11. Proof of publication will be the affidavit of the publisher or foreman of the newspaper employed that the notice (a copy of which must be annexed to the affidavit) was published in said newspaper once a week for five successive weeks. Such affidavit must show that the notice was published in the regular and entire issue of the paper and was published in the newspaper proper and not in a supplement.



The proof of publication of notice must be filed with the register within ninety days after receipt of notice for publication and will be forwarded by the register to the General Land Office with a report as to whether protest or contest has been filed against any selection, and if protest or contest is filed the same shall accompany the report. Failure by the State or Territory to furnish proof of publication within the time limited will be cause for the rejection of the selection, upon report of such failure by the register, accompanied with evidence of service of notice prescribed in rule 10.

During the period of publication, or any time thereafter, and before final approval and certification, the local officers may receive protest or contest as to any of the tracts applied for and transmit the same to the General Land Office.

Where lands sought to be selected are alleged, by way of protest, to be mineral, or where applications for patent therefor are presented under the mining laws, or are otherwise adversely claimed, proceedings in such cases will be in the nature of a contest and will be governed by the rules of practice in force in contest cases.

12. Surveyed lands of the United States, reserved or withdrawn from entry, location, and selection under the general land laws, and thereafter restored to the public domain (not under a special statute), may be selected in satisfaction of grants or reservations in aid of common schools, if of the character contemplated thereby, in such manner as shall be prescribed in the proclamations or notices of restoration. Lists of selections received by mail not more than three days prior to the day on which the lands are opened to entry, location, and selection generally will be treated as if received on the day of such opening, and will be considered as proffered after the claims of all persons present at the time of the opening of the office have been received, but a list received by mail more than three days prior to the day of the opening will be rejected as prematurely filed.

13. No application will be allowed for lands covered by an existing selection or entry, nor will any right be recognized as initiated by the tender of any such application. In any case, however, where for good and sufficient reason a selection has been held for cancellation, the State or Territory may be permitted to relinquish such selection, and with such relinquishment tender a new application for the same land. This relinquishment and application must be accompanied by a statement, under oath, of the officer or officers of the State or Territory charged with the selection of lands, showing that proper precaution was taken, in the first instance, to avoid the tender of a defective selection, and will be forwarded to the General Land Office, where the case will be considered and if the showing made is found satisfactory the relinquishment will be accepted and the new application returned for allowance as of the date of filing. The

statement accompanying such relinquishment and application will be closely scrutinized and unless the utmost good faith is shown the new application will be rejected.

Amendment of indemnity school land selections by the substitution of new and valid base, in whole or in part, in place of that originally tendered, defective from any cause, may be allowed, in the discretion of the Commissioner of the General Land Office. Applications in such cases must be accompanied by a statement, under oath, of the officer or officers indicated in the paragraph next above, fully explaining the tender of the original defective base and how the error or mistake occurred, and will be forwarded to the General Land Office for consideration, where, if it is believed that every reasonable effort was made and precaution taken to avoid the tender of such defective base, the substitution of the new and valid base may be permitted in cases where no intervening claims exist.

14. The local officers will not enter on their records the relinquishment of any state selection until directed to do so by the General Land Office. All relinquishments of state selections will be forwarded to the General Land Office, through the local office, and, if accepted, the local officers will be directed to cancel the selections on their records. The cancellation will become effective as of the date of receipt of order of cancellation by the local office; after which, and not before, the land, if not reserved, will be subject to disposition under the general land laws.

15. When a school section has been identified by survey, and no claim is asserted thereto under the mining or other public land laws, the presumption is that title to the land has passed to the State, but such presumption may be overcome by the submission of satisfactory proof to the contrary.

16. The States will not be permitted to make selections in lieu of lands within a school section alleged to be mineral, in the absence of proof that such lands are known to be valuable for mineral. Such preliminary proof must show the kind of mineral discovered and the extent thereof.

17. Upon the submission by the State of an ex parte showing, consisting of corroborated affidavits, alleging that the land is valuable for mineral, accompanied with an application for indemnity in lieu of such lands, and certificates of the proper state authorities showing that said lands have not been sold, encumbered, or otherwise disposed of, as required by rule 7, the register will certify as to the date of the filing of said list, the status of the land selected, as shown by the record, and forward the list to the General Land Office by special letter, without further action.

The legal fees payable upon such selection must be tendered with the application to select, and will be received and held as *unearned*

*fees and other trust funds* until the selection has been allowed, or finally rejected, and in the meantime no action will be taken looking to the disposal of the selected land.

If the showing is deemed sufficient, a hearing will be ordered by this office to determine the character of the land, evidence to be submitted in support of the allegation contained in the preliminary showing. Notice of such hearing must be given by the State, by publication, once a week for five successive weeks, in a newspaper designated by the register of the land office of the district in which the lands are situated, as published nearest to the location of such base lands, and proof that the notice was published must be filed in the local land office on or before the day of hearing.

All proof filed and testimony taken at such hearing will be forwarded to the General Land Office.

Should the proof be found sufficient, the list will be returned for allowance, when notice of selection will be published, as required by rule 9 hereof, and the State will be further required to furnish the certificate of the officer in charge of the record in the county where the lands are situated, or from a reliable and responsible abstractor or abstract company, showing that said lands have not been sold, encumbered, or otherwise disposed of, as required by rule 7.

18. A determination by the General Land Office, or the department, that a portion of the smallest legal subdivision in a school section is mineral land will place that entire subdivision in the class of lands that may be used as a basis for indemnity selection, and where mineral entry was made of any portion of the smallest legal subdivision of a school section that fact will be taken as determining the right of the State to indemnity for the entire legal subdivision upon proper showing that the State has not made any disposition of the land not embraced in such mineral entry.

19. All previous rulings and instructions not in harmony herewith are hereby vacated.

FRED DENNETT,  
*Commissioner.*

Approved June 23, 1910.

R. A. BALLINGER,  
*Secretary.*

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JEWETT W. ADAMS.

Motion for review of departmental decision of January 12, 1910, 38 L. D., 375, denied by First Assistant Secretary Pierce, June 24, 1910.

**RAILROAD GRANT—INDIAN RESERVATION—RIGHT OF WAY—FORFEITURE—SECTION 4, ACT OF MARCH 2, 1899.**

**SPOKANE AND BRITISH COLUMBIA RY. CO.**

The provision in section 4 of the act of March 2, 1899, that rights of way granted by that act "shall be deemed forfeited and abandoned *ipso facto*" as to portions of the road not constructed and in operation as required by the act, is not effective to work a forfeiture of the grant until there has been due ascertainment and declaration of forfeiture by proper authority; and at any time prior to such ascertainment the Secretary of the Interior may extend the time for completion of the road, under authority of the proviso to said section.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 24, 1910.* (G. B. G.)

This is the appeal of the Spokane and British Columbia Railway Company from your office decision of December 10, 1909, denying its application, under the act of June 21, 1906 (34 Stat., 325, 377), for the reservation of certain lands in the townsite of Klaxta, on the Spokane Indian Reservation, State of Washington, for right of way, together with an approach to "Sand Bar Landing," on the Columbia River, as delineated on its map of location filed with the Indian Office October, 1905, and as described in its said application.

This proceeding arose upon conflicting applications of J. P. Graves, trustee of a corporation then yet to be organized, and the Big Bend Transit Company, and the said Spokane and British Columbia Railway Company, to purchase terminal sites situated within the townsite of Klaxta, heretofore set apart for disposal under that portion of the act of June 21, 1906, *supra*, which provides:

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to sell and convey by patent with such reservations as to flowage rights, dam sites, and mill sites, appurtenant to water powers, as he may prescribe, such tract or tracts of lands of the Spokane Indian Reservation, State of Washington, lying at or near the junction of the Columbia and Spokane rivers, not exceeding three hundred and sixty acres in extent, for townsite and terminal purposes, upon the payment of such price as may be fixed by him, and that the money received therefrom shall be deposited in the Treasury of the United States to the credit of the Spokane Indians.

Your said office decision recites that the land set apart under this act, as originally designated in December, 1906, embraced lots 7, 8, 9, 10, and 11, the E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of Sec. 30, T. 28 N., R. 36 E., W. M., containing 293.65 acres, but that subsequently, it appearing that lot 2 of Sec. 25, T. 28 N., R. 35 E., containing .75 of an acre, was appropriately situated for disposition under said act, its withdrawal for that purpose was ordered October 16, 1909, and as thus increased the land so designated for sale, as aforesaid, comprises 294.40 acres lying within the former Spokane Indian Reserva-

tion and immediately at the junction of the Columbia and Spokane rivers.

By the same decision which rejected the said application of the Spokane and British Columbia Railway Company, your office, upon the respective applications, August 10, 1908, of J. P. Graves, trustee, and the Big Bend Transit Company, allotted to said Graves, as trustee for the Spokane, Columbia and Western Railway Company, a terminal site described as "all those portions of lots 9 and 11 of said section 30, lying between the Big Bend Transit Company's right of way and the said rivers on the south and west. This allotment includes the western portion of tract 1, described in the Transit company's application," and allotted to the Big Bend Transit Company, "such portion of lot 2 of section 23, T. 28 N., R. 35 E., as is not included in said company's existing right of way and station grounds; also all of that portion of tract 4 which is embraced within said section 30; also all of tract 2 and all of tract 1, excepting that portion thereof lying in lot 11 of said section thirty and included in said allotment to Mr. Graves."

From these allotments, however, there was, by said decision, deducted a strip of land 100 feet in width, or so much thereof as would not interfere with said approved right of way, running parallel with and abutting on the meander line of the Spokane River through lots 7, 10, and 11 of section 30, such strip to be reserved and subdivided for disposal under the townsite law, with due preference to Mr. Graves's company, in the matter of crossing the strip in lot 11 from the south side of the river, with tracks, bridges, or trestles at or above grade.

Neither Graves, trustee, nor the Big Bend Transit Company has appealed from said decision, so the only issues for departmental consideration are presented by the appeal of the Spokane and British Columbia Railway Company, whose claims to consideration are based upon:

1. Alleged misconstruction of the act of March 2, 1899 (30 Stat., 990), in respect to the status of the right of way within the townsite of Klaxta, heretofore approved to the Big Bend Transit Company.
2. Alleged error in making the allotments hereinbefore described to the Big Bend Transit Company and to J. P. Graves, trustee.
3. Alleged error in denying the application of appellant upon the ground that it has no real need of terminals within the townsite of Klaxta.

It appears that prior to these proceedings, and on March 18, 1905, and March 8, 1907, respectively, there had been approved by the Secretary of the Interior to the Adams County Electric Transit Company, and to the said Big Bend Transit Company, successor in interest to the first-named company, a right of way and amended right

of way, under the act of March 2, 1899 (30 Stat., 990), across the area embraced in this townsite. Section four of that act provides:

That if any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned *ipso facto* as to that portion of the road not then constructed and in operation: *Provided*, That the Secretary may, when he deems proper, extend for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

It is contended upon the appeal that the phrase "shall be deemed forfeited and abandoned *ipso facto*," as found in said section, operates as a self-acting forfeiture, and that no action on the part of the United States is necessary for the resumption of title. This contention your office denies and the Department concurs in that action. It may be, and probably is, true that the happening of the conditions named in the act upon which it is declared a right of way shall be deemed forfeited and abandoned *ipso facto*, if invoked, would work a forfeiture of the grant, yet it by no means follows that the ascertainment of this fact by proper authority, and its due declaration, is not necessary to give effect to the statute. On the contrary, until the fact that the company has failed to do the things required within the time therein named has been duly ascertained, it may not be well said that forfeiture has resulted. This is undoubtedly the general rule, and it is thought that the forfeiture clause of the act in question is within it. See *Schulenberg v. Harriman* (21 Wall., 63). This view is strengthened by the proviso to the act which authorizes the Secretary of the Interior, in his discretion, to extend the time for the completion of any road for which a right of way has been granted, if any part of it has been built. It is true that this proviso is susceptible of the construction that the discretion thereby conferred upon the Secretary of the Interior must be exercised before the expiration of the time provided by the body of the statute; but the better view would seem to be that at any time before there has been a judicial ascertainment of the facts upon which forfeiture may be based, such extension may be granted by the Secretary of the Interior. That this was the intention of Congress is fairly clear, and it results that the appellant-company has no just ground of complaint that recognition of this subsisting right of way be accorded.

The record has been examined upon the allegation of error in the allotments made to J. P. Graves, trustee, and to the Big Bend Transit Company. As to Graves, it is argued that his company has no intention, in the immediate future, of utilizing the terminal sites allotted in that behalf. The record upon this question is not entirely satisfactory and the building of any line of road for the utilization

of this terminal site is entirely problematical, but your office decision states with considerable force that the public interest demands that no one railroad company should have a monopoly of available terminal sites and that the reservation on behalf of Graves, trustee, was made largely upon that theory. That the future needs of the town may not be embarrassed by monopolistic reservation it was thought best, and the Department concurs in the view that it is best this terminal site allotted to Mr. Graves be reserved from appropriation by the Big Bend Transit Company, and whether Mr. Graves or his company should utilize it or not, it will be there for the use of some competing line when the future necessities of the town demand it. As to the Big Bend Transit Company, as above stated, it has an approved right of way across the land covered by this townsite, and a most careful examination of the record does not warrant an imputation of bad faith against that company. It has contended long against serious obstacles and has accomplished much. It undoubtedly desires to build, and it is believed will build, a road through this townsite, and it will be in great need of the terminal facilities represented by the allotments made to it under the act of 1906.

The record sustains your office holding that it is not shown the Spokane and British Columbia Railway Company has any real need of terminals within the townsite. It will be remembered that this is the same company which had approved to it, October 17, 1905, a right of way across the Colville Indian Reservation, which has never been utilized by the company because, as urged in its behalf, such right of way is in litigation now before the Supreme Court of the United States. As to that right of way certain damages were assessed on behalf of the Colville Indians, which have never been paid, the company contending that it ought not to be required to pay the same until the aforesaid litigation shall have been terminated. This company was on March 22, 1910, advised that until these damages shall have been paid this Department will decline to consider its further application for right of way across the Spokane Indian Reservation, or for any other part of its line. That ruling is significant as against the good faith of this company and holds good as to its applications for terminal grounds within Klaxta townsite. The record strongly tends to show that the Spokane and British Columbia Railway Company has no immediate intention of building a line of road within this townsite, and it is altogether probable that if it should lose in the aforesaid litigation, it will abandon its right of way across the Colville Indian Reservation. Under such circumstances it is not entitled to serious consideration.

The decision appealed from is affirmed.

**ENLARGEMENT OF DESERT LAND ENTRY—WITHDRAWN LANDS—RESTORATION.****BRIDGET THIBEDEAU.**

Where a desert entryman could not at date of entry, because of an existing withdrawal covering part of the land desired by him, embrace in his entry the full area allowed by law, he may, upon restoration of the withdrawn lands, be permitted to enlarge his entry to conform to his original intention.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 25, 1910.* (G. C. R.)

August 6, 1909, Bridget Thibedeau made desert land entry 05912 for the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 5, S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 6, T. 33 N., R. 18 E., Glasgow, Montana.

It appears that said township was withdrawn, second form, under the act of June 17, 1902 (32 Stat., 388), in connection with the Milk River Project on February 9, 1903. The tract so entered by Thibedeau, with other lands, were restored to entry, September 2, 1908, and became subject thereto, February 1, 1909.

November 15, 1909, Thibedeau filed her application to enlarge said entry by including the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 6, and the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 7, of same township.

Her application, which was duly sworn to, stated that when on August 6, 1909, she made the entry aforesaid, she tried also to enter the two 40-acre tracts applied for; that she was not permitted to do so for the reason that said tracts were held under a reclamation withdrawal and were, therefore, not then subject to entry.

Your office, March 12, 1910, rejected the application because the same does not come within the instructions of July 26, 1907 (36 L. D., 44).

Thibedeau has appealed to this Department, alleging error, etc.

It appears that the lands in controversy were not subject to entry at date when the applicant entered the 120 acres, but were included within a reclamation withdrawal. They were restored to entry, however, July 9, 1909, and became subject thereto November 15, 1909.

On that day, claimant renewed her application therefor. The lands applied for and those entered are contiguous.

The instructions referred to by your office, *supra*, relate to enlargement of homestead and desert land entries. Referring to the latter named class of entries, the Department therein said:

As to desert-land entries for less than the maximum amount allowed to be entered by one person, the Department is of opinion that good and sufficient reason exists for restricting their enlargement to cases where the entryman could not, at the date of the entry as originally made, because of the existence of entries or filings covering adjacent lands, embrace in his entry the full quantity allowed by law, but immediately took appropriate steps to clear the



record as to a particular tract of such adjacent land, with the view to subsequently including such tract in his own entry, and clearly indicated in his application to make the original entry that that was his intention. Your office is therefore instructed to allow the enlargement of desert-land entries under no other circumstances.

Authorization for enlargement of desert land entries is clearly given. The only step the applicant failed to take, as laid down in the instructions, entitling her to a larger entry, was that she did not "immediately take proper steps to clear the record" of the impediment which prevented the allowance of her application to enter the entire 200 acres of land.

There were no "entries or filings" of record to clear. It would not have been "appropriate" for claimant to have taken steps to clear the record of the then existing withdrawal. At least, it would have been a useless attempt.

On making the original entry, she clearly indicated that she wished to enter the additional lands. She could not properly have done more. Her application herein substantially complies with the instructions quoted.

If no reason appears for rejecting the application, other than that disclosed by your office, let the same be allowed.

The action appealed from is reversed.

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**MINING CLAIMS IN ALASKA—EXTENSION OF TIME FOR FILING ADVERSE CLAIMS AND INSTITUTING SUIT THEREON.**

**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., June 25, 1910.*

REGISTERS AND RECEIVERS,

*United States Land Offices, District of Alaska.*

SIRS: Your attention is directed to the act of Congress approved June 7, 1910 (Public, No. 198), copy herewith, relating to the filing of adverse claims, and the institution of suits thereon, against mineral applications in the District of Alaska.

**EXTENSION OF TIME FOR FILING ADVERSE CLAIMS.**

The act provides that adverse claims may be filed at any time during the sixty-day period of publication or within eight months thereafter. This provision applies to any application where the sixty-day period of publication ended with, or ends after, June 7, 1910, and operates to enlarge by eight months additional the time within which an adverse claim may be filed. This provision does not

apply to any application under which the sixty-day period of publication ended with, or before, June 6, 1910, for, if no adverse claim was seasonably filed in such case, the statutory assumption that none existed has arisen, upon the expiration of the publication period, in favor of the applicant.

EXTENSION OF TIME WITHIN WHICH ADVERSE SUITS MAY BE INSTITUTED.

It is also provided by the act that adverse suits may be instituted at any time within sixty days after the filing of adverse claims in the local land office. This provision applies to any adverse claim under which the thirty-day period fixed under the former law for commencing the adverse suit was running on, or expired with, June 7, 1910, and enlarges such time to a period of sixty days, and also to any adverse claim which is seasonably filed on, or after, June 7, 1910. Such provision has no operation in a case where, under the former law, the thirty-day period within which to institute suit on an adverse claim expired with, or ended before, June 6, 1910, and the sixty-day publication period also expired on, or before, June 6, 1910.

You will exercise the greatest care in applying the provisions of the act, and will allow no mineral entry until after the expiration of the full period granted for the filing of adverse claims. For example, on any application under which the publication period ended with, or after, June 7, 1910, no entry will in any event be allowed until after the expiration of the eight-months period following the publication period.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER, *Secretary.*

[Public—No. 198.]

AN ACT Extending the time in which to file adverse claims and institute adverse suits against mineral entries in the district of Alaska.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the district of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office.

Approved, June 7, 1910.

## APPEALS FROM ACTION OF FIELD OFFICERS IN RECLAMATION MATTERS.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
RECLAMATION SERVICE,  
*Washington, D. C., June 27, 1910.*

In considering an appeal from the action of the register and receiver of the local land office at Williston, North Dakota, in rejecting a water right application which the project engineer refused to approve, the Department on June 4, 1910, held as follows (39 L. D., 2) :

The Secretary of the Interior is the supervising head of the Reclamation Service, as he is of the land department and the Indian office. Persons dealing with the Reclamation Service have a right to ask his ultimate decision, as do persons dealing with the Indian Office and the General Land Office. The project engineer is simply the local representative of the Secretary of the Interior in deciding such matter. If a water applicant allege and show that error has been made by the project engineer, as, for instance, that a portion of his land is above the water line and receives no benefit, it is within the power of the Secretary to correct such mistake. It is not, however, the right of a private land owner to refuse to take water for all of his irrigable land after he has subjected it to charges for reimbursement of the United States in construction of the project. The United States cannot force him to subject his land, but if he does subject it, he is not entitled to claim water for a fraction of it and leave the United States not reimbursed for his portion of the project. His subjecting his land was one of the inducements moving the United States to construction of the project, and his obligation is fixed.

Under the regulations the land office can grant water rights only upon approval of the project engineer. So there was no error in the action of the local office or of your office. Neither the local office nor general land office can review the action of the project engineer. That can be done only by appeal to the Director of the Reclamation Service, and further from his action to the Secretary of the Interior—supervising head of the Reclamation Service.

In order to provide for the orderly review by the Secretary of errors that may occur in the establishment of farm units or in passing upon water right applications the following procedure will be followed :

1. All cases of error should be promptly called to the attention of the project engineer by the party affected.
2. If the project engineer decides not to take the steps necessary to grant relief, the matter may be brought to the attention of the Secretary of the Interior, as hereinafter provided.
3. The party aggrieved should promptly file with the project engineer a written statement addressed to the Director setting out clearly and definitely the grounds of complaint.
4. The project engineer will note thereon the date of its receipt in his office and promptly forward the same with report and recommendation to the Director through the Supervising Engineer, who will attach his recommendation.

5. Upon receipt of the papers in the Director's office, the matter will be carefully reviewed and if the action of the project engineer is concurred in, the claimant will be allowed sixty days in which to file with the Director an appeal to the Secretary of the Interior. In case of appeal, the matter will be submitted to the Secretary for consideration and appropriate action.

F. H. NEWELL, *Director*.

Approved, June 27, 1910:

R. A. BALLINGER, *Secretary*.

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**HEARINGS AND APPEALS IN CASES INVOLVING LANDS OR CLAIMS WITHIN  
NATIONAL FORESTS.**

**CIRCULAR.**

*June 27, 1910.*

TO THE COMMISSIONER, REGISTERS AND RECEIVERS, AND CHIEFS OF FIELD DIVISION, GENERAL LAND OFFICE, DEPARTMENT OF INTERIOR; THE FORESTER, DISTRICT FORESTERS, AND DISTRICT LAW OFFICERS OF THE DEPARTMENT OF AGRICULTURE.

GENTLEMEN: To better effectuate cooperation in protecting the interest of the Government and settlers and other claimants for lands within National Forests, the following orders are effective:

1. Forest Supervisors will submit all reports made by forest officers to the District Forester who, when satisfied with said reports, will transmit the same to the Secretary of Agriculture; the Secretary of Agriculture will forward such reports to the Secretary of Interior. The Commissioner of the General Land Office will return said reports to the proper Chief of Field Division for notation upon his records and for his approval in the event he finds the same sufficient; and should the Chief of Field Division find such report insufficient to warrant proceeding to hearing or the taking of other appropriate action, he will return the same with endorsements, asking that the Department of Agriculture make such additional investigation as may be necessary, or in the event he deems it advisable he will cause an agent of the General Land Office to make such additional investigation.

2. Upon order or application for hearings upon reports covering lands or claims within a National Forest, the Register and Receiver will send duplicate notices thereof to the Chief of Field Division and the District Law Officer. Before setting date for the hearing in any such case, the Chief of Field Division will confer with the proper District Law Officer and thereupon suggest to the Register and Receiver a date for hearing, and the names of witnesses to be

subpoenaed upon behalf of the Government. In the event the Chief of Field Division and the District Law Officer are unable to agree as to the date of hearing, the matter will be referred by the Chief of Field Division to the Commissioner of the General Land Office, who will give the necessary direction in the premises.

3. In all hearings affecting lands or claims within a national forest, the Chief of Field Division or a special agent of the General Land Office, *and* the District Law Officer, or Assistant District Law Officer, will be entered of record as appearing on behalf of the Government. The Chief of Field Division or special agent acting as attorney for the Government in any such case will control the government's side of the case in any matter as to which counsel are unable to agree, subject to any direction that may be given by the Commissioner of the General Land Office, in case the matters of difference are of such importance as to be presented to him for action.

4. In all Government cases before registers and receivers involving lands or claims within a National Forest the Chief of Field Division and the District Law Officer shall each be served with notice of all motions, orders and decisions required to be noticed under the rules in cases of private contests. The proper law officers of the Department of Agriculture shall also have a right of appeal from any decision by the Commissioner of the General Land Office, and to file motion for review in the Department, or take other like action in the same manner as a private contestant; and shall receive like notices of proceedings and decisions.

5. Costs incident to hearings before Registers and Receivers in Government cases involving lands or claims within a National Forest will be paid under rules now in force. Expenses incident to appeals will be paid by the Department of Agriculture; except that, where feasible, Chiefs of Field Division may give aid in office work in preparation of papers, briefs, etc.

Very respectfully,

R. A. BALLINGER,

*Secretary of the Interior.*

JAMES WILSON,

*Secretary of Agriculture.*

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**SWAMP LAND—ISLANDS IN SABINE RIVER—BOUNDARY BETWEEN LOUISIANA AND TEXAS.**

**STATE OF LOUISIANA.**

For the purpose of determining whether certain islands lying between the two channels of the Sabine River at a point known as the "Narrows" are part of the public domain and of the character of lands that pass to the State of Louisiana under its swamp land grant, the west bank of the western channel of the river at this point will be recognized as the boundary between the States of Louisiana and Texas.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 27, 1910.* (E. F. B.)

The Department is in receipt of your letter of March 7, 1910, relative to the claim of the State of Louisiana that two islands lying in the Sabine River between said State and the State of Texas west of frl. Ts. 9 and 10 S., R. 13 W., are a part of the public lands of the United States, inuring to said State under its grant of swamp and overflowed lands.

By letter of December 2, 1907, you expressed the opinion that said islands are within the State of Louisiana as shown by the survey of 1840, executed by direction of a joint commission appointed under authority of the convention of April 25, 1838, between the United States and the Republic of Texas (8 Stat., 511). As the State of Louisiana claimed that said islands are swamp and overflowed land inuring under its grant, you recommended that an examination of said land be made by the Surveyor General of Louisiana with sufficient accuracy to enable him to segregate the swamp from the dry lands, and, in case both classes of lands are found, that a survey thereof be made, if necessary, in order to determine what legal subdivisions are of the character of lands that passed to the State under its grant. You further recommended that, upon receipt of the examiner's report, the Surveyor General be instructed to forward to your office a list of the lands found to be swamp and overflowed and, should he report that none of the lands passed to the State under the swamp grant, that he give his reasons therefor and allow the State the usual right of appeal. That letter was approved by the Department December 2, 1907.

You now call attention to the recommendation contained in that letter and state that when said letter was written there was a doubt as to whether the lands in question were in Louisiana, but, since then, that question has been presented by the protest of the State of Texas, in which it is asserted that said lands are within the limits of that State and no part of them is in the State of Louisiana.

You now express the opinion that the eastern channel of the Sabine River is the western boundary of Louisiana, and hence that State is not entitled to assert any claim to said lands; but you express no opinion as to whether the lands in question belong to the United States or the State of Texas.

The territory in question is an island lying between two channels of the Sabine River at a point called the Narrows. If your view is correct, that the eastern channel of the Sabine River at the Narrows is the western boundary of Louisiana, it must necessarily follow that the lands in question belong to the State of Texas, for the reason that the western boundary of Louisiana and the eastern boundary of

Texas, as extended by the act of July 5, 1848 (9 Stat., 245), are coincident. There is no Federal territory lying between the State of Louisiana and the State of Texas.

The State of Texas has issued patents to purchasers from said State of lands composing said island as part of its territory and dominion. The State of Louisiana has also issued its patents for a part of said lands, claiming ownership of the same under the grant to said State of swamp and overflowed lands made by the act of March 2, 1849. Said States and the grantees of the State of Texas have been heard orally in support of their respective claims.

Much stress has been laid by the State of Texas upon the fact that the public land surveys made by the United States of the territory lying contiguous to said island were closed upon the eastern channel of the Sabine River, thereby tacitly admitting that said channel was the Sabine River proper that formed the boundary between said States.

The mere fact that the public land surveys may have been closed upon said channel as the Sabine River and that there is great irregularity in the public land surveys of the townships contiguous to and covering said island is not material in determining the limits of jurisdiction of the respective States, for the reason that the eastern boundary of Texas as fixed by the joint commission pursuant to the treaty between the United States and the United Mexican States, so far as it affects the territory in controversy, is so well defined and established by the work of that commission and the treaty under which they were acting as to leave no reasonable ground upon which any dispute can arise as to the true locus of that boundary.

The western boundary of Louisiana was fixed by the act of April 8, 1812 (2 Stat., 701), admitting said State into the Union, and is described as follows:

Beginning at mouth of the River Sabine; thence, by a line to be drawn along the *middle* of said river, including all islands, to the 32° of latitude, thence due north to the northernmost part of the 33° of north latitude.

In the absence of any term limiting or restricting the boundary to a particular channel of the river, the limits described would extend, by the plain language of the statute, to the farthest or western channel of the river, even if the other descriptive term, "including all islands," had been omitted; but when considered together those terms of description indicate with absolute certainty that the western boundary of the State is the farthest western branch or channel through which any part of the waters of the Sabine River may naturally flow.

Confirmation of this view is found in the treaties with foreign nations establishing the limits of the foreign territory lying contiguous thereto. By the third article of the treaty of February 22,

1819 (8 Stat., 252), between the United States and Spain, it was declared that the boundary between the two countries from the Gulf of Mexico at the mouth of the Sabine River to the 32° latitude shall begin "at the mouth of the River Sabine, in the sea, continuing north along the *western bank* of that river to the 32° of latitude. . . . All the islands in the Sabine River, . . . throughout the course thus described, to belong to the United States." But the navigation of the Sabine River to the sea is declared to be common to both nations.

After the United States of Mexico had obtained their independence of Spanish rule a treaty of limits was made January 12, 1828 (8 Stat., 372), between said nation and the United States of America, which declared that the dividing limits of the bordering territories of the United States of America and of the United Mexican States shall be the same as were agreed upon and fixed by the treaty of February 22, 1819, with Spain, and said limits were again defined in the exact words adopted in the Spanish treaty.

Provision was then made for fixing said line with more precision by the appointment of commissioners on the part of each of the contracting parties, to mark and survey said boundary. The joint commission was required to make out plans and keep journals of their proceedings, "and the result agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein."

No action was taken pursuant thereto until after the Republic of Texas had acquired its independence, when a convention was had April 25, 1838, between the United States and the Republic of Texas, which acknowledged that the treaty of January 12, 1828, was binding upon said Republic, it being at the time of said treaty a part of the "United Mexican States." (8 Stat., 511.)

Under authority of that convention commissioners were appointed by each of said contracting parties to survey and mark said boundary. The journal of the commission and a tinted plat of the survey of said boundary by said commission are on file in the Department of State as official documents. That plat is the official delineation of the line of survey as made and reported by said commission. Upon the face of it is the following inscription, signed by the several members of the joint commission:

Map of the River Sabine from its mouth on the Gulf of Mexico in the Sea to Logans Ferry in latitude 31° 58' 24" North, showing the boundary between the United States and the Republic of Texas between said points, as marked and laid down by survey in 1840 under direction of the commissioners appointed for that purpose, under the 1st article of the convention; signed at Washington April 25, 1838.



There is also inserted upon the map the following "note:"

The boundary between the two countries is denoted on the map by the junction of the red with the yellow tint, red representing the Territory of Texas and yellow the Territory of the United States.

A copy of said original map showing that part of said boundary west of the land in question, which has been carefully compared, is filed with the papers transmitted with your said letter.

The Territory of the Republic of Texas is indicated upon said map as lying west of said river throughout its entire course. Where there are two channels, as at the Narrows, which is plainly indicated upon said map or plat, the Territory of Texas is confined to the west bank of the westernmost channel of the river, leaving all east of such bank within the dominion of the United States. The yellow tint covers all the land in question and all of the river irrespective of channel and is in harmony with the description of said boundary as given in the treaty between the United States and the "United Mexican States."

From the foregoing it will be seen that the enabling act and the act admitting the State of Louisiana into the Union fixed as part of its western boundary the middle of the Sabine River from the mouth of said river to the 32° of latitude "including all islands;" that the eastern boundary of Texas was fixed by convention as the west bank of said river, "all the islands in the Sabine . . . to belong to the United States." The boundaries thus defined necessarily left the western portion of the westernmost channel exclusively in Federal jurisdiction and dominion.

It was not until the act of July 5, 1848 (9 Stat., 245), that the State of Texas acquired a right to any part of the waters of said river. By that act the United States consented that the State of Texas may "extend her eastern boundary so as to include within her limits, one-half of Sabine Pass, one-half Sabine Lake, also one-half of Sabine River, from the mouth as far north as the 32° of north latitude." The eastern boundary of Texas was thus made to coincide with the western boundary of Louisiana as fixed by the act of admission, and the State of Texas for the first time acquired jurisdiction and dominion over any part of the waters of said river.

In the course of the argument it was admitted by the State of Texas and its grantee that the commission's map of the Sabine River shows that the Territory of Texas lies wholly west of the west channel of the river and that the land in controversy is represented upon said plat as lying wholly within the State of Louisiana. It is contended, however, that the boundary established by the commission is not correctly delineated upon that map, as shown by the journal, and that it should therefore be made to conform to the journal, which must control.

The rule that the field notes control where there is a discrepancy between them and the plat is well established. But the plat of survey is *prima facie* evidence that it is a correct representation of the survey as returned by the field notes. If the correctness of the plat is challenged it must be shown by the party challenging wherein it fails to designate the true line as surveyed.

It does not appear, however, from a careful inspection of the journal of the joint commission that there is any discrepancy whatever between the map and the journal.

The only entry in the journal to which attention has been called in support of the contention that the line as described upon the plat does not follow the line indicated by the journal is the statement that on the 12th of November, 1839, the commissioners then present assembled at Green's Bluff, about 35 miles from the mouth of the Sabine River, from which point they "moved up the river about 15 miles to Millspaugh's Bluff," where they encamped from day to day until the arrival of the astronomical apparatus and instruments; that on the 23d day of November one of the surveying party was accidentally killed and "his remains were interred on the following day. A solitary pine on the west bank of the Sabine River marks the spot where they repose."

That entry has no significance whatever as indicating the line traced by the commission. It was not a call of the boundary, but was established merely as a winter camp where the commission remained awaiting the arrival of the astronomical instruments. It was abandoned long before the survey of the boundary was commenced.

After the arrival of the topographical engineers with the astronomical instruments at the mouth of the Sabine River they were joined by the commissioners February 12, 1840. During the delay caused by the nonarrival of the instruments the commissioners of the Republic of Texas, under instructions from their Government, set up a claim to the center of Sabine Pass, Sabine Lake, and the Sabine River.

May 15, 1840, the joint commission assembled at Green's Bluff, and the Republic of Texas having withdrawn its claim to the center of said waters, the commission on the 19th of May "left the encampment at Green's Bluff and descended the river . . . for the purpose of *beginning the survey*."

There is not a single line of the journal to indicate that the commission at any time crossed to the east bank of any part of the Sabine River, or that it fixed the boundary at any place east of the westernmost channel of the river. On the contrary, the description of that part of the survey affecting the land in question clearly indicates that the boundary line agreed upon and fixed was on the west bank of the western channel of the river at the Narrows and that

it did not at any time ascend the east channel upon which is located Millspaugh's Bluff.

On the evening of the 22d of May the commission proceeded up the river as far as "Ballew's Ferry," at the lower end of the Narrows. From that point they proceeded the following morning to trace the line of the boundary opposite to the island in question. All that is shown by the journal as to the survey of this line is embodied in the following entry:

May 23.—At about 11 o'clock, A. M., left Ballew's Ferry, where the boat had lain during the night, and continued the work of tracing the boundary up the river. We proceeded this day about fifty miles. For thirty miles after leaving Ballew's the river winds in a continued succession of abrupt sinuosities.

The map shows that the western channel of the river "winds in a continued succession of abrupt sinuosities" as described in the journal, whereas the east channel of the Narrows is merely traced by a dotted line from Millspaugh's Bluff to within a short distance of the head of the Narrows.

It is not claimed that there has been any change in the position of the west channel of the Narrows. To whatever extent navigation of that channel may have been impeded, there is no pretense that its location has been changed.

No discrepancy is shown between the journal and the map. On the contrary, it is shown throughout the journal that the commission never carried the boundary line at any point across any part of the Sabine River, but confined it to the west bank of the western channel of the river on the line described upon the plat, which occupied the exact *locus* that is found to-day.

The Supreme Court of the United States has sole jurisdiction to finally determine the question of disputed boundaries between States. (*Virginia v. Tennessee*, 148 U. S., 503.) No decision that may be made herein would be binding upon the States. But it is the duty of the Department to determine whether the lands in question are part of the public domain and whether they are of the character of lands that pass to the State of Louisiana under its grant of swamp and overflowed lands. For that purpose it must determine for itself what boundary should be recognized, and such determination must be made according to the elementary rules that control in the question of disputed boundaries.

The true line in a navigable river between States of the Union which separates jurisdiction of one from the other is the middle of the main channel of the river. If there be more than one channel of a river, the deepest channel is the mid-channel for the purpose of territorial demarcation (*Iowa v. Illinois*, 147 U. S., 1). That is also the rule as between nations if there be no convention respecting it (*Handly v. Anthony*, 5 Wheat., 374; *U. S. v. Texas*, 162, U. S., 1).

But that rule has no application in this case, for the reason that the boundary between the Republic of Texas and the United States was fixed by convention. Furthermore, the river was not the boundary, but the boundary between said Republic and the United States was the west bank of the river, and such boundary continued to be the east boundary of Texas until the act of July 5, 1848, when the United States consented that the State of Texas may extend its limits from the western bank of the river to the middle of the stream. It can not be presumed, however, that the United States intended by such legislation to take from the State of Louisiana any part of its territory or to change in any respect the boundaries established by the act of its admission, even if it had authority to do so. (*Louisiana v. Mississippi*, 202 U. S., 1, 40.)

You will execute the instructions given in the letter of December 2, 1907.

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WILLIAMS *v.* KIRK.

Motion for review of departmental decision of February 7, 1910, 38 L. D., 429, denied by First Assistant Secretary Pierce, June 27, 1910.

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SERVICE OF NOTICE OF CONTEST ON SUNDAY.

CROCKFORD *v.* MALLORY.

Service of notice of a contest by leaving a copy with the husband of contestee is insufficient and confers no jurisdiction.

Service of notice of a contest on Sunday is invalid and no jurisdiction is thereby acquired.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, June 29, 1910.* (J. F. T.)

September 19, 1904, Etta Doughty, now Mallory, made homestead entry number 8729 for the SE.  $\frac{1}{4}$ , Sec. 8, T. 7 N., R. 6 E., Belle-fourche, South Dakota, land district.

July 12, 1909, Adelaide Crockford filed contest affidavit against said entry, charging that claimant never established residence on the land, and that she is now married and lives with her husband, Judson Mallory, on his unperfected homestead entry which adjoins the land.

Notice was issued and, it appears by the record, placed in the hands of the United States Commissioner at Vale, South Dakota, before whom as such commissioner it was directed that the testimony be taken on September 21, 1909.

July 29, 1909, said commissioner attempted to make service of the contest notice by leaving a copy thereof with Judson Mallory, husband of defendant. He later concluded that this service was insufficient and on the 8th day of August, 1909, being Sunday, said commissioner personally served the said contest notice upon the contestee at Vale, South Dakota, where she was attending church services.

September 21, 1909, the contestee appeared "specially" before said commissioner by filing objections to the jurisdiction, as follows:

Comes now the contestee in the above entitled matter and objects to any further proceedings in the above entitled matter, upon the ground and for the reason that the said Land Office and the said Department of the Interior have no jurisdiction to further hear the said matter on the ground and for the reason that no service of the contest notice has been made upon the contestee, and said contestee here and now appears specially and moves to quash and vacate the alleged service on the notice of contest herein, upon the contestee herein, on the ground that said alleged service of the contest notice was made on Sunday, which motion will be based upon the affidavit of the contestee hereto attached, and this objection and motion will be urged at every subsequent stage of this proceeding, beginning with the taking of testimony herein before Hugo Beherns, U. S. Land Commissioner at Vale, S. D., on Sept. 21, 1909—

and has since said date stood upon the issue so made.

The said United States Commissioner on said date took the *ex parte* testimony submitted by contestant, which, upon its face, without cross-examination, is sufficient to sustain the allegations of the contest affidavit.

September 27, 1909, the local officers joined in decision, which, after statement of facts, concludes as follows:

#### CONCLUSIONS OF LAW.

I. That the service of the notice of contest herein upon Judson Mallory, the husband of the defendant, on July 29th, 1909, was not such service as is required by rule 9 of the Rules of Practice; and was null and void. *Ackerson v. Dean*, 10 L. D., 477. *Richards v. Roberts*, 21 L. D., 335.

II. That the service of the contest notice herein upon defendant on the 8th day of August, 1909, said day being Sunday, a day which is *dies non juridicus*, was equally inoperative, it nowhere appearing that the interests of the plaintiff imperatively required service to be made upon that day. 4 *Chitty's Blacks.*, 64; *People v. Donovan*, 20 Abb. N. Cas., N. Y.; *Story v. Elliott*, 8 Cow., N. Y., 27; *Paul v. Bruce*, 9 Bush., Ky., 317; *Richards v. Schreiber*, 98 Iowa, 422; *Re King*, 46 Fed. Rep., 905.

III. That since defendant has not been legally notified of the contest against her, and since plaintiff was confronted on the day set for hearing by a special appearance on behalf of defendant for the purpose of making a motion to quash because of non legal service of process, this office has not acquired jurisdiction in the premises; and since on this day set for final hearing the plaintiff has made no application for alias notices of contest, but has elected to stand upon the sufficiency of the notice as served, no jurisdiction has been acquired by this office in the premises; and the contest of the plaintiff must be, and is hereby, quashed and dismissed. *Popp v. Doty*, 24 L. D., 350.

Plaintiff is allowed thirty days from notice wherein to appeal from this decision to the Commissioner of the General Land Office; and upon failure of the plaintiff to so appeal, this decision will stand without further notice.

Upon appeal to your office, by your decision of February 26, 1910, you have reversed the action of the local officers as follows:

You cite text books and State Supreme Court decisions in support of your ruling that service of a court process on Sunday is inoperative. It is true that many, if not all, of the States have enacted laws prohibiting the service of a summons, subpoena, warrant, etc., on Sunday, except in certain extreme cases, but none of these statutes are binding upon the Land Department. There is no act of Congress, no rule of practice, or departmental regulation that prohibits the service of a contest notice on Sunday, and in the absence of such prohibition such service is perfectly legal.

Whatever restriction may exist as to the exercise of judicial functions by courts on Sunday and holidays, on the ground that such day is *dies non juridicus*, it does not appear that a ministerial act, such as the service of a contest notice, is open to objection.

Your decision is, therefore, reversed and it is held that the service of notice was proper, but as the contestee is entitled to her day in court to defend her entry, the case is hereby remanded and you are directed to set a day, not less than thirty days from notice by registered letter to the parties, on which day the contestee will be allowed to submit such testimony as she may desire to offer in defense of her entry and in rebuttal of the testimony heretofore offered by contestant, and if she does so, the contestant may submit testimony in rebuttal thereof; but if contestee makes default, or fails to submit testimony, the contestant will not be required to proceed further with his case. The contestee will be required to defend her entry whether the contestant appears or does not appear, as he has already made out a *prima facie* case warranting the cancellation of the entry. If contestee appears and submits testimony, you will, at the conclusion of the hearing, render a decision on the merits, and notify the party aggrieved of the right of appeal.

If no action is taken by contestee, you will return the record herewith returned, with your report, accompanied with evidence of service of notice of the hearing on contestee.

In your decision no attention is paid to the attempted service of notice by leaving a copy thereof with the husband of contestee, and the Department is of the opinion that such attempted service was clearly insufficient and will pay no further attention thereto.

The Department, however, is unable to concur in your conclusion that the service of a contest notice upon Sunday is not open to objection, or is sufficient for any purpose. The service of notice in this case was clearly made upon Sunday and so affirmatively appears by the affidavit of the United States Commissioner who made such service and also took the testimony in this case, as judicial notice will always be taken of days of the week. It has been held by the Department that where an act is required to be performed within a stated period, and the last day of the period is Sunday, the act may be performed on the day following. See cases of *George Leinen* (8 L. D., 233) and *Ground Hog Lode v. Parole* (8 L. D., 430); also where the

last day is a public holiday. *Waterhouse v. Scott* (13 L. D., 718). The Department has therefore considered Sunday and public holidays alike in this regard, and this could be only upon the proposition that Sunday is *dies non juridicus*. There is no showing of necessity of service in this case upon Sunday, and it is doubtful if any attempt to make such showing could be heard.

It must be conceded, without citation of authority, that service of notice is necessary to give jurisdiction of the contestee, and that proceeding without service of such notice appearing affirmatively in the record is invalid, unless such service in some manner is waived or appearance made. It is true, as stated in your decision, that "there is no act of Congress, no rule of practice, or departmental regulation that prohibits the service of a contest notice on Sunday." But it is thought that such failure of direct positive prohibition is because by common and universal consensus of opinion no such service is proper and no such prohibition has been deemed necessary. The proposition is given countenance by the fact that no attempt at such service appears to have been made, and the records of the Department do not show that such question has been hitherto presented. The process in question and service thereof is almost the exact equivalent of summons and service thereof by which the common *nisi prius* courts are given jurisdiction of a defendant, and it is conceded to be the universal rule that service of such summons in civil cases can not be made upon Sunday. Such is the law of South Dakota. See Revised Statutes of South Dakota, 1903, Section 48, Penal Code; and the same is true of most of the United States.

It is not considered necessary to go at length into the question as to the proper observance of Sunday, but it is thought proper to cite the decision of the United States Supreme Court in the case of *Church of Holy Trinity v. United States* (143 U. S., 457); calling especial attention to pages 465 to 472; and it is thought that beyond all matters herein discussed the mere omission of a positive prohibition in the regulations of the Department against the service of a contest notice on Sunday, can not be construed into any purpose on the part of the Department to disregard or hold for naught the generally declared provisions of the statutes and the almost or quite universal custom of the courts in regard to the service of civil process upon the first day of the week. The entire history of this nation and people and of its civil polity from the inception of national existence to the present time forbids such conclusion. The practice of state courts and United States courts in this regard is the same. See Section 914 of the Revised Statutes.

It is therefore held that the attempted service of this contest notice on Sunday, August 8, 1909, was entirely invalid, and that the de-

cision of the local officers dismissing the contest when no application for *alias* notice was made by contestant, was correct.

This decision will not operate to prevent another contest by this contestant or any other party who may properly initiate the same. The charges made against this entry and now appearing as part of the record will have appropriate consideration by you when attempt is made by the present entrywoman to obtain title to the land, and, if deemed proper by you, such charges appearing in the record may be made the basis of a Government proceeding against the entry.

Your decision is reversed and the pending contest of Adelaide Crockford is dismissed.

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McCaw v. SORVARI.

Motion for review of departmental decision of April 16, 1910, 38 L. D., 571, denied by First Assistant Secretary Pierce, June 29, 1910.

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FOREST LIEU SELECTION—FRAUDULENT ACQUIREMENT OF BASE—CERTIORARI.

THOMAS B. WALKER.

The validity of a forest lieu selection under the act of June 4, 1897, does not depend upon whether the United States acquired a good title to the base land which it can successfully defend as a *bona fide* purchaser, but whether the selection was made in good faith and not by fraudulent practices and in pursuance of unlawful designs; and the Department will not, upon petition for certiorari, control the action of the General Land Office in ordering a hearing to determine whether the selector acquired title to the base land by fraudulent means for the purpose of selecting other lands in lieu thereof.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 6, 1910.* (E. F. B.)

This petition is filed by Thomas B. Walker, praying that the record in the matter of forest lieu selection, No. 5603, for certain lands in the Susanville land district, California, be certified to the Department for consideration and decision in order that petitioner may be relieved from the hardship, expense, and annoyance involved in the order of your office of May 13, 1910, requiring him to deny certain charges preferred against said selection, and in the event of such denial directing a hearing in said case.

This selection was made by petitioner in lieu of part of a school-section which was patented to him by the State of California October 26, 1900, and was conveyed to the United States November 19, 1900, by petitioner as a base for the selection in question.



It was charged by a special agent that the title to the base land was illegally obtained from the State of California and was fraudulent in this, that the application made to the State, under section 3495 of the Political Code of California, in the name of Edward B. Clark, was made in the interest and for the use and benefit of petitioner, Thomas B. Walker; that the affidavit made by Clark that he desired to purchase said land for his own use and benefit and for the use and benefit of no other person or persons whatever, as required by said section, was false and that in view of such false statement the applicant's right to purchase the land or to receive any evidence of title was defeated.

Petitioner denied generally that his right to a patent for said land was defeated by reason of any false statements that may have been made by Clark, and he insists that the patent issued to him as an assignee under the right of purchase acquired upon the application of Clark passed the fee simple title. He does not, however, deny the charge that the application made by Clark was for the sole use and benefit of petitioner and not for the use and benefit of Clark.

He insists that as the patent was issued nearly ten years ago, and as neither the State nor any third party has ever questioned the validity of the title acquired from the State, there is no reasonable ground for the assumption that the patent is liable to successful attack or to warrant the United States in attacking the title conveyed to the Government by petitioner, either for the protection of any interest of its own or in good conscience.

Petitioner contends generally that no practical purpose can be subserved by such hearing, as the title of the State can not be avoided except by the State of California, which is not complaining.

The action taken in this case is similar in all respects to the action taken in the matter of forest lieu selection made by Duncan McNee, which was claimed by George A. Keeline, as assignee of McNee, and the facts are the same except in the Keeline case the selection had been assigned to a third party.

In that case it was charged that one Bell, who made the application upon which the title was based, did not make said application for his own use and benefit but for the use and benefit of Duncan McNee, the selector. A petition for certiorari was granted upon the ground that a mere charge that Bell made said application for the use and benefit of McNee and not for his own use and benefit, unaccompanied by affidavits of persons who had knowledge of such alleged fraud, and whose testimony could be procured at the hearing, is not sufficient to warrant the Department in requiring the selector to incur the expense of a hearing in order to protect his title to the base land, which appears upon its face to be regular and valid.

When the record was transmitted to the Department, in response to the order granting the petition for certiorari, it appeared that the charge of the special agent was based upon the affidavit of Bell, who stated that he made the application at the suggestion of McNee; that he had never seen the land, did not pay any money on account of said application, and never expected to make any use of the land, but signed the paper to accommodate his friend McNee.

In that case, as in this, it was urged that as the State was not complaining of the title and as the record showed that the certificate of purchase was duly assigned to the selector, to whom patent issued, the title conveyed to the United States by the selector is a good and valid title which can not be annulled at the instance of a third party.

The Department refused to control the action of your office ordering a hearing, for the reason that "the validity of the selection does not depend upon whether the United States acquired a good title to the base land which it can successfully defend as a *bona fide* purchaser, but whether the selection was made in good faith and not by fraudulent practices and in pursuance of unlawful designs."

Authority for that ruling was found in the decision of the Supreme Court in the case of *Hyde v. Shine* (199 U. S., 62, 83), in which the question was considered as to whether the rights of the United States would be violated by a selection of land made in lieu of lands the title to which was fraudulently obtained, even though the recovery of the title to said base lands could be successfully defended by the United States as a *bona fide* purchaser. In considering that question the court said:

Under the circumstances it can not be doubted that the United States might maintain a bill to cancel the patents to the exchanged lands procured by these fraudulent means, notwithstanding its title to the forest reserve lands might be good.

If the United States may recover title to lands thus acquired it can surely refuse to issue a patent for them.

While the primary object of the act which authorized the exchange of lands within forest reserves was for the purpose of enabling the United States to acquire title to private holdings within such reserves, it did not contemplate that opportunity should be afforded to persons to obtain title to public lands by means of corrupt and fraudulent practices, whether such corrupt and fraudulent practices were exercised in obtaining the base for the selection or in the selection of the lieu lands. Hence, as stated in the Keeline case, the violation of the statute is the fraudulent practice pursued by the selector which the United States may or may not take advantage of, as it may see proper.

The hearing is not for the purpose of avoiding the State's title but to ascertain whether the selector had acquired it by fraudulent means for the purpose of making an exchange of land. If so, the selection is tainted with such fraud and is vitiated.

It is insisted that there is nothing in the charge that connects Walker as a party to any irregularity or fraud in the procurement of the title to the base land or that he induced the filing of the application by Clark or that it was made pursuant to any agreement with him.

That question need not be considered by the Department, but should be left to your office for determination whether, as stated in the case of George A. Keeline, the charge is supported by affidavits of persons who have knowledge of such alleged fraud and whose testimony could be procured at the hearing. If the proof is clear and positive that the applicant made the application for the benefit of the selector it affords a reasonable presumption that the beneficiary had knowledge of such fraudulent purpose which would require proof to overcome.

Also in the case of E. Howard Thompson, decided June 28, 1910, the Department refused to control the discretion of your office ordering a hearing upon somewhat similar charge, but you were advised that a hearing should not be ordered in any case unless your office is in possession of convincing and satisfactory proofs of the fraud and that the selector had knowledge thereof.

This petition is denied and the papers are transmitted to your office for filing, and with instructions to take such further action thereon as you may deem advisable in the light of the instructions herein referred to.

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**GLACIER NATIONAL PARK—ACT OF MAY 11, 1910.**

**INSTRUCTIONS.**

**DEPARTMENT OF THE INTERIOR,**

**GENERAL LAND OFFICE,**

*Washington, D. C., July 6, 1910.*

**REGISTER AND RECEIVER,**

*Kalispell, Montana.*

SIRS: I herewith inclose, for your information, a copy of the act of May 11, 1910 (Public, No. 171), creating and establishing "The Glacier National Park" in the State of Montana within your land district.

The said act became effective upon approval thereof by the President, and no applications to enter any of the lands within its boundaries should, therefore, be allowed on and after May 11, 1910, except

under the first proviso thereto which provides that nothing therein contained "shall affect any valid existing claim, location, or entry under the land laws of the United States or the rights of any such claimant, locator or entryman to the full use and enjoyment of his land." All applications to enter, which do not come within the above proviso, should be rejected and the usual right of appeal allowed to this office.

Applications for rights-of-way for steam and electric railways through the valleys of the north and middle forks of the Flathead River will be received and the same will be considered under the laws applicable to the acquisition of such rights over or upon the unappropriated public domain.

You will carefully mark upon your records the boundary of the said park as shown by the metes and bounds contained in the enclosed copy.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved, July 6, 1910:

FRANK PIERCE,  
*Acting Secretary.*

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[PUBLIC—No. 171.]

An Act To establish "The Glacier National Park" in the Rocky Mountains south of the international boundary line, in the State of Montana, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the tract of land in the State of Montana particularly described by metes and bounds as follows, to wit: Commencing at a point on the international boundary between the United States and the Dominion of Canada at the middle of the Flathead River; thence following southerly along and with the middle of the Flathead River to its confluence with the Middle Fork of the Flathead River; thence following the north bank of said Middle Fork of the Flathead River to where it is crossed by the north boundary of the right of way of the Great Northern Railroad; thence following the said right of way to where it intersects the west boundary of the Blackfeet Indian Reservation; thence northerly along said west boundary to its intersection with the international boundary; thence along said international boundary to the place of beginning, is hereby reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States, and dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States under the name of "The Glacier National Park;" and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided further*, That rights of way through the valleys of the North and Middle forks of the Flathead River for steam or electric railways may be acquired within said Glacier

National Park under filings or proceedings heretofore or hereafter made or instituted under the laws applicable to the acquisition of such rights over or upon the unappropriated public domain of the United States, and that the United States Reclamation Service may enter upon and utilize for flowage or other purposes any area within said park which may be necessary for the development and maintenance of a government reclamation project: *And provided further*, That no lands within the limits of said park hereby created belonging to or claimed by any railroad or other corporation now having or claiming the right of indemnity selection by virtue of any law or contract whatsoever shall be used as a basis for indemnity selection in any State or Territory whatsoever for any loss sustained by reason of the creation of said park.

SEC. 2. That said park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations not inconsistent with the laws of the United States as he may deem necessary or proper for the care, protection, management, and improvement of the same, which regulations shall provide for the preservation of the park in a state of nature so far as is consistent with the purposes of this Act, and for the care and protection of the fish and game within the boundaries thereof. Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent at any one place to any one person or company, for not to exceed twenty years, when such ground is necessary for the erection of buildings for the accommodation of visitors, and to parcels of ground not exceeding one acre in extent and for not to exceed twenty years to persons who have heretofore erected or whom he may hereafter authorize to erect summer homes or cottages; he may also sell and permit the removal of such matured, or dead or down timber as he may deem necessary or advisable for the protection or improvement of the park.

Approved, May 11, 1910.

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**RAILROAD GRANT—RELINQUISHMENT—ACT OF JUNE 22, 1874.**

**FULLER v. NORTHERN PACIFIC RY. CO.**

Neither the act of June 22, 1874, nor the amendatory act of August 29, 1890, authorizes relinquishment by a railroad company, with a view to selection of other lands, in favor of one who has no entry or filing of record or who has not resided upon and improved the land for five years.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 7, 1910.* (G. B. G.)

This case involves lots 9, 10 and 13, Sec. 5, T. 45 N., R. 2 E., Coeur d'Alene land district, Idaho, and the case came to the Department on the appeal of Clifford C. Fuller from your office decision of November 14, 1907, denying his homestead application for said land, because of a prior indemnity selection thereof by the Northern Pacific Railway Company.

The plat of survey of that portion of the township in which this land is situated was filed in the local land office October 24, 1898, and on that day the company selected said land as indemnity per list No. 41.

On September 4, 1906, one Will W. Duncan presented a timber and stone sworn statement for said land, which the local land officers, on March 22, 1907, forwarded to your office, with the statement that the land was embraced in the company's selection, but had apparently never been approved or patented to the company.

The homestead application of the said Clifford C. Fuller was presented March 20, 1907, but this application was rejected by the local officers for conflict with the said timber and stone application of Duncan. Fuller appealed from this action, but did not at that time allege settlement on the land applied for.

This was the state of the record when your said office decision of November 14, 1907, was rendered. That decision also rejected the application of Duncan, but Duncan did not appeal, and the case came to the Department, as above stated, on the appeal of Fuller.

Inasmuch as Fuller, in support of his appeal to the Department, alleged continuous residence on the land since May 10, 1907, and that he had made extensive and valuable improvements thereon, amounting to \$2,500, the Department, being impressed with these alleged equities, suggested to counsel for said company that a relinquishment of the land to the United States under the act of June 22, 1874 (18 Stat., 194), would be favorably considered. Responsive to this suggestion, under date of June 2, 1909, the attorneys for the company informed the Department that the company had under serious consideration the possibility of relinquishing this land in favor of Fuller, under the act of June 22, 1874, but that the company had sent an examiner to inspect the premises, and that the report of such examiner, copy of which was submitted, indicated that the claim was not such an one as would justify the company in relinquishing in his favor, or as would justify the Department in asking for such relinquishment, and suggested that if there was any doubt as to the correctness of the report of the company's agent, the Department have a field examination made by one of its own special agents.

June 4, 1909, the Department returned the record to your office, and directed that a special agent be detailed to investigate this matter, and that he be instructed to examine fully as to the facts and circumstances bearing upon the settlement, residence and improvement by the homestead applicant, giving special attention to the question of good faith in the initiation and maintenance of said claim; that after the agent should have reported, your office consider the whole case, and forward the same to the Department, with recommendation for final disposition.

In accordance with said departmental instructions and instructions of your office, an examination of this land was made by a special agent, after due notice to Fuller and the railway company. The report of the special agent gives in detail the result of his investiga-

tions, which may be stated to be, that it is thereby shown that the said Fuller constructed a house and other buildings on said land during the year 1907 at an expense of nearly \$3,000, and that he moved his family into said house in August, 1907, and that, except for temporary absences for business reasons, he has lived there ever since, the report satisfactorily showing that he has maintained a good faith residence upon the land since the year 1907.

These facts do not appear to have been, since the filing of said report, disputed by the company; but in view of the fact that Fuller has not been a settler and resident upon this land for the period of five years, it is not believed that the relief which the Department contemplated extending to him may be indulged, even if the consent of the railway company might be secured thereto.

The act of June 22, 1874 (18 Stat., 194), provides that in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler "whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands," the grantees, upon a proper relinquishment of the lands "so entered or filed for," shall be entitled to select an equal quantity of other lands in lieu thereof.

Manifestly Fuller is not within this statute. He was allowed to make no "entry or filing" of these lands under the preemption, homestead, or other law of the United States, and there is no authority in this act for accepting a relinquishment from the railway company, and allowing it to select other lands in lieu of the lands relinquished.

The act of June 22, 1874, *supra*, was amended by the act of August 29, 1890 (26 Stat., 369), which provides:

That the privileges granted by the aforesaid act approved June twenty-second, eighteen hundred and seventy-four, are hereby extended (subject to the provisos, limitations, and restrictions thereof) to all persons entitled to the right of homestead or pre-emption under the laws of the United States, who have resided upon and improved for five years lands granted to any railroad company, but whose entries or filings have not for any cause been admitted to record.

It will be readily perceived that this act has no application to the case in hand. It is not shown, nor alleged, that Fuller has resided upon or improved this land for five years, and unless such were the case, nothing is presented for consideration under said amendatory act.

It appears that during the pendency of this case, and on June 24, 1909, this land was inadvertently patented to said company. It may

be that because of such inadvertence, without regard to the merits of the railway company's claim, a suit could be maintained to set aside this patent; but, however this may be, it appearing that the company's selection was a valid one, the issuance of patent to the land was in nowise prejudicial to any rights which Fuller had therein, and, under such circumstances, no good purpose could be subserved by instituting such suit. Even if the Government were successful in a suit brought upon the ground of inadvertence only, it would become the duty of the land department to sustain the claim of the company and again issue its patent for said land.

It may not be inappropriate to add that the Department has exhausted every administrative resource at its command to bring about a satisfactory adjustment of this matter. After the aforesaid special agent's report, which disclosed facts that barred an adjustment under the act of June 22, 1874, *supra*, it was informally requested of counsel for the company that he suggest the best terms upon which it would sell the land, and the Department was advised that the company would sell to Fuller for \$12 per acre, reserving, however, the right of way for the Chicago, Milwaukee and St. Paul Railway. This offer was communicated to Fuller, through your office, but, in a communication of the 10th ultimo, he declined to accept it, saying that he preferred to acquire title under the homestead law. This is not possible. No law has been suggested, and none has been found, which will permit him to acquire title from the Government. The Department, therefore, knows of no valid reason for further delay of final action on the case.

The decision appealed from is affirmed.

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**PRACTICE—HEARING—COMMUTATION—RESIDENCE—LEAVE OF ABSENCE.**

**ESBERNE K. MULLER.**

Failure of the government by reason of some unforeseen emergency, to have a representative present at the time and place fixed for hearing upon a special agent's report against an entry is no bar to a second order for a hearing to determine the true facts with respect to the entry under investigation. Commutation is allowed only upon a showing of substantially continuous personal presence upon the land for a period of fourteen months next preceding submission of proof; and residence prior to a period of absence under leave of absence granted the entryman can not be added to residence subsequent to that period to make up the necessary fourteen months. Absence under leave granted in accordance with the provisions of the act of March 2, 1889, will not be considered residence toward making up the period of eight months required by section 9 of the act of May 29, 1908.



*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 7, 1910.* (O. W. L.)

Appeal has been filed in the matter of homestead entry No. 3594, made March 21, 1901, by Esberne K. Muller, at Tucson, Arizona, for the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of Sec. 22, and the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of Sec. 23, T. 10 S., R. 24 E., now Phoenix, Arizona, land district. Commutation proof was offered April 25, 1903, and cash certificate No. 1578 issued April 27, 1903.

An adverse report of a special agent having been received, your office, on November 12, 1904, directed notice of charges as follows:

He (the special agent) had made a personal examination of said tract and found it partly barren and sandy and remainder covered with screw bean and mesquite, unfit for cultivation without irrigation, now owned by George Fishbaugh; dilapidated house of tin cans, built in spring of 1901 by entryman's father and brother, who lived on adjoining land. No signs of cultivation. Entryman at time of entry worked for Southern Pacific R. R. at Yuma. Employed continuously until April 27, 1903. Entryman left Yuma shortly after selling land and now reported to be dead. Never made permanent residence on land.

The entryman was served personally with notice March 5, 1905. A transferee filed application for hearing March 10, 1905, which was ordered by your office December 4, 1905. The hearing was fixed for May 27, 1908, at which time the entryman and George Fishbaugh, the ultimate transferee, appeared. There was no appearance on the part of the Government, but the defendants nevertheless introduced testimony in their own behalf. It having appeared that the reason for the non-appearance of the Government being the fact that there was no special agent available to conduct the hearing, your office, on November 20, 1908, directed the register and receiver to issue notice for a new hearing, which was accordingly set for January 15, 1909, before the Clerk of the District Court at Yuma, Arizona, and final hearing, on *March* 19, 1909. Both parties appeared and introduced testimony, the defendants, however, moving to dismiss the proceeding, on the ground of the Government's previous default. The local officers recommended that the entry be canceled, finding that the entryman's alleged occupancy consisted of only an occasional visit to the land; that, taking his own testimony, it showed nothing more than frequent visits; that there was nothing to show that he had ever made the land his home, and, having sought to commute, he must show that he was personally present thereon for substantially the entire period.

Your office sustained their finding, upon another ground, *viz.*, that the commutation proof showed that the entryman was absent from his claim for eleven out of twelve months next prior to the making of commutation proof, under leave of absence granted March 18,

1902, to March 18, 1903. The commutation proof alleges that he established residence March 22, 1901, and that he resided continuously upon the land, except eleven months, under the leave of absence.

Appellant's attorney contends that your action should be reversed, upon substantially two grounds: (1) that the ordering of hearing after the Government failed to appear at the time fixed for the first trial was inequitable; (2) that as the proof showed that the entryman had resided on the land for the period of a year prior to the granting of the leave of absence, and for a period of two months and nine days after his return prior to submission of commutation proof, such periods of residence, when taken together, constituted fourteen months' residence, and that he was therefore entitled to make commutation proof.

While a hearing based upon the adverse report of a special agent should be held as promptly as possible, still, where unforeseen emergencies prevent the Government from so appearing, it is within the power of the Department to order another hearing, in order that the true facts relative to the entry under charge can be ascertained. The testimony taken in the absence of any representative of the Government, and without cross-examination, can not, of course, be considered.

The appellant's second contention is also not well founded. Section 2301, Revised Statutes, as amended, provides:

Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section two thousand two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation *for such period of fourteen months.*

Leaves of absence are granted under section 3 of the act of March 2, 1889 (25 Stat., 854), which provides that when it shall be made to appear to the register and receiver of any land district that any settler—

is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

This act serves to protect the settler during the time his leave of absence is in effect. (See *Quein v. Lewis*, 20 L. D., 319.)

Where a homesteader is granted a leave of absence, the time of his absence can not be deducted from the period of residence required by law. (See *Katharine O. Elder*, 30 L. D., 21.)

In the case of James A. Hagerty (35 L. D., 252) it was held that in view of the comparatively brief period an entryman is required to live on the land in order to make commutation proof, and of the fact that he is not obliged to submit proof within that short time, the entryman must show not only that he established a *bona fide* residence on the land within six months from the date of entry, but that his actual presence there was thereafter substantially continuous to the date of submitting commutation proof. This holding was affirmed in the case of Fred Lidgett (35 L. D., 371), the second paragraph of the syllabus reading:

A homestead entryman by his election to commute assumes the burden of showing full compliance with law in the matters of residence, improvement and cultivation, and the proof will not be accepted by the land department unless it shows the substantially continuous presence of the claimant upon the land for the required period.

In the cases of Ed Jenkins (37 L. D., 434) and Anna V. Kuhn (37 L. D., 437) it was held that credit for constructive residence during official employment could not be allowed in commutation proof.

From the above decisions it is apparent that the period of fourteen months stated in the statute must be next preceding the submission of commutation proof. Further, the residence required under section 2301, Revised Statutes, is a substantially continuous personal presence on the land. Therefore, if the entryman elects to avail himself of the protection afforded by the act of March 2, 1889, *supra*, and thereafter further elects to submit commutation proof, he must show a period of fourteen months' continuous residence next prior to the submission of the proof.

The entry is also not within the confirmatory provisions of section 9 of the act of May 29, 1908 (35 Stat., 465), which confirms previous final certificates issued under the commutation provisions where the entryman had in good faith "resided upon and improved the lands covered by his entry for at least eight months within the year immediately preceding the submission of such proof." In the case of E. N. McGlothlin (36 L. D., 502) it was held that absence in prison under judicial restraint could not be considered residence toward making up the period of eight months so required. In the present case the entryman was absent due to conditions provided for in the act of March 2, 1889. In the one case, the absence was due to compulsion of law, and in the other by compulsion of unforeseen casualties.

The Department is further of the opinion that the record substantiates the finding of the register and receiver. Your decision is therefore affirmed.

**INDIAN ALLOTMENTS—COAL LANDS—SURFACE PATENTS—ACT JUNE 22, 1910.****INSTRUCTIONS.**

Indians to whom allotments have been made of lands withdrawn as coal lands within the additions to the Navajo Indian reservation in New Mexico, created by executive orders of November 9, 1907, and January 28, 1908, and whose allotments are known to embrace lands valuable for coal, are entitled to surface patents therefor under the provisions of the act of June 22, 1910.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 9, 1910.* (S. W. W.)

In your letter of June 11, 1910, you asked whether patents should be issued to Indians to whom allotments have been made of lands withdrawn as coal land within the additions to the Navajo Indian Reservation in New Mexico, created by executive orders of November 9, 1907, and January 28, 1908.

It appears that prior to the extension of the Indian reservation over these lands some of them were withdrawn as coal land June 15, 1907, and later dates.

The Commissioner of Indian Affairs, to whom your letter was referred for report, states that of the 1646 allotments which have been approved many of them probably embrace lands within coal areas, and recommends that patents be issued for the lands allotted, which patents should contain a clause as prescribed by the act of March 3, 1909 (35 Stat., 844).

Since the matter was submitted by your office, Congress has passed the act to provide for agricultural entries on coal lands, June 22, 1910 (Public, No. 227), the proviso to the first section of which declares that those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of the act, on land withdrawn or classified as coal land, may perfect the same under the provisions of the laws under which such entries were made, but shall receive the limited patent provided for in the act.

It is believed that the Indians are entitled to surface patents, as provided in said act of June 22, 1910, and your office is authorized to issue such patents for those allotments embracing lands known to be valuable for coal.

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**FOREST LIEU SELECTION—TITLE TO BASE LAND—ACT OF JUNE 4, 1897.****HIRAM M. HAMILTON.**

An assignee of a contract to purchase land from the State of California, who acquires title from the State under the contract by patent in due form after full payment, has good title, if he in no way participated in, connived at, or had knowledge of fraud in the purchase from the State; and it is no objection to acceptance of such title as basis for lieu selection under the act of June 4, 1897, that the contract of purchase may have been procured from the State through fraud.

*First Assistant Secretary Pierce to the Commissioner of the General  
(F. W. C.) Land Office, July 9, 1910. (J. R. W.)*

Hiram M. Hamilton appealed from your decision of February 11, 1910, overruling his demurrer and directing hearing on charges against his selection 4018, your series, under act of June 4, 1897 (30 Stat., 36), for SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 4, SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 8, SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 17, all in T. 34 N., R. 3 W., N.M.M., Durango, Colorado, in lieu of SE.  $\frac{1}{4}$ , Sec. 16, T. 11 N., R. 17 E., M.D.M., California, in a forest reserve, relinquished to the United States.

April 6, 1901, Hamilton, by Robert E. Sloan, attorney in fact, made the selection. July 17, 1909, a special agent of your office reported that the base was part of the school land grant of the State of California, and, on June 29, 1899, Harvey W. Snow applied to the State land office for its purchase; that February 10, 1900, purchase certificate issued to Harvey W. Snow and the land was conveyed to Hiram M. Hamilton, January 29, 1900, to whom patent issued January 19, 1901. It is here noted that the conveyance by Snow to Hamilton was twelve days earlier than the issue of certificate of purchase by the State to Snow. The special agent further reported that he had an interview with Harvey W. Snow in the Chronicle Building, San Francisco, California, and that Snow admitted to the special agent that he, Snow, had been permitting use of his name in applications to purchase lands from the State and had probably signed forty or fifty applications, the greater number of which were abandoned; that many applications he signed were at request of his brother, H. H. Snow, then connected with the State land office, and some such applications were signed at request of F. W. Lake, and the purchaser, Harvey W. Snow, was paid small sums of money at different times for such use of his name; that at no time was Harvey W. Snow applicant for lands for his own use. On such facts the special agent recommended that:

Title to the base having been acquired in a manner contrary to the provisions of the statutes of the State of California, and in such way that your office has decided an exchange is not proper under the act of June 4, 1897, I recommend that the selector be notified that the selection is held for cancellation, subject to his right to show cause why same should not be canceled, for the reasons set forth in this report.

On such report your office, September 14, 1909, directed the local office to proceed against the selection under circular of November 25, 1907, upon the charge:

That title of the selector to said base land relinquished by him January 25, 1901, to the United States is invalid and was so at the time of said relinquishment, because selector's grantor, Harvey W. Snow, original applicant for said land, acquired his title thereto from the State of California in a

manner contrary to the law of such State, in that he was never at any time an actual settler on said land, and that he did not make said application for said land in good faith to secure said land for his own use and benefit as a home, and said selector, Hiram M. Hamilton, had notice of all of the above facts.

To this charge Hamilton demurred and asked recall of the order for hearing. You overruled his demurrer, and ordered that the hearing proceed.

It is noticeable that the special agent charged no notice to Hamilton of the irregular practices or frauds against the State committed by Harvey W. Snow. For all that the special agent reported, Hamilton was entirely innocent, in no way participating in such fraud, or having notice of it. That part of the charge formulated by you respecting Hamilton's notice of the frauds of Snow had no foundation in the record. It stands therefore merely on the fraud that Snow is supposed to have perpetrated upon the State in obtaining a purchase contract which he assigned to Hamilton, and on which Hamilton obtained title from the State by patent in due form after completing full payment. In precisely such a case, in a controversy between private parties, the Supreme Court of California held, in *Green v. Hayes* (11 Pac., 716, 719; 7 Cal., 276), that:

Whatever defect or irregularities there may have been in Jaughin's application to purchase the land from the State, they were cured by the issuance of the patent, and can not be called in question in this action, where the plaintiff is not seeking to obtain the State's title.

The United States might well refuse to accept this title, and grant an exchange, if any fraud was charged constituting an offense against the United States in obtaining title to this land for the purpose of an exchange with the United States. No fact is charged that even tends in that direction. For all that appears Hamilton was merely a victim of Snow's illegal conduct, whereby he was made to pay Snow something for a purchase right fraudulently obtained by Snow, of which Hamilton was innocent. One may be an innocent purchaser of a title merely inchoate. *United States v. Detroit Lumber Company* (200 U. S., 321, 335); *Winona and St. Peter R. R. Co. v. United States* (165 U. S., 483); *United States v. Hyde* (174 Fed., 175, 179-80).

In view of the Department, it is not proper to hold one chargeable with fraud when there is no report or charge against him that he in any way participated, or connived, or had any knowledge of it. Your decision is reversed, and, if no other reason appear than stated in the special agent's report, you will adjudicate Hamilton's selection upon its merits, regardless of any fraud that Snow may have committed.

## SALE OF UNENTERED UINTAH INDIAN LANDS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., July 9, 1910.*

TO THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: It is directed that all of the unreserved, non-mineral lands within the former Uintah Indian Reservation in the State of Utah, opened to settlement and entry under the proclamation of July 14, 1906, which remain unentered on August 28, 1910, and to which no valid existing rights have attached under the public land laws, be offered for sale at public auction under the supervision of James W. Witten, Superintendent of the Opening and Sale of Indian Lands, at the city of Provo, Utah, on November 1, 1910, and thereafter, in legal subdivisions approximating one hundred and sixty acres each, as near as may be, except in cases where the owners or purchasers of lands adjacent to offered tracts shall request the offering of such adjacent tracts in smaller legal subdivisions.

No person shall be permitted to purchase more than six hundred and forty acres in his own right, or at a less price than fifty cents per acre, and the purchaser of each tract must pay the entire purchase price thereof to the receiver of the Vernal United States land office, then temporarily at Provo, before 4.30 o'clock, P. M., on the second day after the sale thereof, and if he fails to so make such payment, he will forfeit all right to the tract so purchased and the tract will be again offered on the next day after he makes default in such payment, and any person so defaulting will not be permitted to bid for or purchase other tracts at this sale.

The Superintendent of the sale will be authorized to prescribe such rules for the proper conducting of the sale, not in conflict herewith, as the exigencies may require, and he may at any time suspend or indefinitely postpone the sale, or adjourn it to such time or place as he may deem advisable, and may reject any and all bids which in his opinion are less than the actual cash value of the land offered.

All persons are warned under the penalty of the law against entering into any agreement, combination, or conspiracy, which will prevent any of said lands from selling advantageously, or which will result in any one person becoming the purchaser of more than six hundred and forty acres at said sale, and all persons so offending will be prosecuted criminally for so doing.

Very respectfully,

FRANK PIERCE,  
*Acting Secretary.*

**TIMBER CUTTING—"RESIDENT"—FOREIGN CORPORATION—ACT JUNE 3, 1878.****CENTERVILLE MINING AND MILLING CO.**

A foreign corporation, although doing business solely within the State of Idaho, and having complied with the requirements of the state statutes, is not a resident of the state within the meaning of the act of June 3, 1878, authorizing *bona fide* "residents" of the states and territories therein named to cut timber for certain purposes from the public mineral lands.

*Commissioner Dennett (with approval of First Assistant Secretary Pierce) to Clinton H. Hartson, Chief of Field Division, Boise, Idaho, July 9, 1910.*

Under date of June 3, 1910, Acting Chief of Field Division Charles D. Hamel transmitted an application, filed with him by one S. K. Atkinson of Centerville, Idaho, to cut 500,000 feet of pine timber from public mineral lands in the S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 27, T. 7 N., R. 5 E., Boise, Idaho, land district, said land having formerly been embraced in timber and stone application 1828, filed by Effa H. Eagleson, canceled by letter "N" of April 8, 1910 (Boise 06463), on the ground that the land is mineral in character.

Accompanying the application are separate reports made by Special Agent Frank E. Johnesse, dated June 1, 1910; and by Acting Chief of Field Division Hamel, dated June 3, 1910.

It would appear from the terms contained in the application that said Atkinson applied for said timber for his own use and that he is to act as agent for himself, but from the accompanying reports it is shown that said timber is not for his own use, but that he is merely acting as agent in procuring same for the use and benefit of the Centerville Mining & Milling Company, of which he is manager and local representative; and that said company was incorporated July 8, 1907, under the laws of the Territory of Arizona, for the purpose of owning and operating mining property in the Boise Basin, Idaho. The reports further show that said corporation has all of its property invested in the State of Idaho; that all of its business is conducted therein; that its chief incentive for mining in that locality is for the recovery of a rare mineral earth, known as monazite, containing thorium, from which incandescent gas mantels are made, and other valuable metallic salts known to chemists; that the location of its properties in this vicinity was as a direct result of the work of the United States Geological Survey in its investigations of the black sands of the Pacific Coast at the Lewis and Clark Exposition; that said company has expended over \$125,000 in developing its properties; that the United States produces only a small amount of the monazite and thorium used in this country, and that the aforesaid company is prose-



cuting its work vigorously in building up this industry in the State of Idaho; that its operations have already demonstrated that the land can be worked to paying advantage; that it is vastly more valuable for mining purposes than for timber or farming or any other purpose for which it might be used; that said company was organized under the laws of the Territory of Arizona, yet it is practically a local organization; and that the interpretation of the statute controlling in this case should be given the broadest meaning, since the company is a meritorious one and deserving of the support of the federal and state authorities as well as of the local community.

It was recommended by Special Agent Johnesse that the application be granted in full.

The report of Acting Chief of Field Division Hamel states that the aforesaid company has complied with all the requirements of the state law necessary to permit it to do business in Idaho; namely, filed its articles of incorporation with the Secretary of State and with the County Recorder, and has filed in writing an acceptance of the provisions of the state constitution.

The aforesaid application has been made under the terms of the act of June 3, 1878 (20 Stat., 88), and circular of March 16, 1909 (37 L. D., 492), which provides:

That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents.

The main point of contention in this case is the question whether or not the said Centerville Mining & Milling Company, having been incorporated in the Territory of Arizona, is such a *bona fide* resident of the State of Idaho as to entitle it to a license granted by the Government to cut the aforesaid timber.

Judge Story, in his Conflict of Laws, page 177 (note), states that the place where the business of the corporation is carried on is by analogy the residence of the company; that is, where the management and direction of its affairs are conducted; that a corporation, therefore, may have a residence in a place different from that in which it was incorporated. He says, speaking of the question of residence of corporations, as discussed by Chief Justice Taney, in the case of the Bank of Augusta *v.* Earle (13 Pet., 519, 588):

The dicta have often been quoted as if they were the expression of a self-evident truth, yet it is difficult to find any sufficient ground for the proposition contained in them.

But while this may have been the holding in the earlier cases, Judge Story's statement of the law as to the residence of foreign corporations is not now supported by the weight of authority as handed down in more recent decisions. A corporation is a citizen of the state which created it (*St. Louis v. Wiggins Ferry Co.*, 11 Wall., 423) and it is incapable of personally passing beyond the limits of the state (*Lafayette Insurance Co. v. French*, 18 Howard, 404). It cannot change its residence or citizenship (*re Schollenberger*, 96 U. S., 369). In the case of the Farmers' Loan & Trust Co., trustee, *v. Chicago & A. R. Co. et al.* (27 Fed., 146), it was stated that:

A state statute which declares a conveyance in trust of real or personal property to other than a "*bona fide resident*" of the state, invalid, . . . held . . . not to govern a conveyance in trust, to a foreign corporation, of property within the state. (Syllabus.)

In the case of *County of Yuba v. Pioneer Gold Mining Company et al.* (32 Fed., 183), it was held that:

The habitation of a corporation is necessarily in the state under whose laws it exists. It can have no other, and it is only recognized in other states and countries upon principles of comity.

See also, for similar holdings, *Filli v. Delaware L. & W. R. Co.* (37 Fed., 65); *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co. et al.* (42 Fed., 81); *Myers et al. v. Murray, Nelson & Co.* (43 Fed., 695); *National Typographic Co. v. N. Y. Typographic Co. et al.* (44 Fed., 711); *Baughman v. National Water-works Co.* (46 Fed., 4); *Miller et al. v. Wheeler & Wilson Mfg. Co.* (46 Fed., 882); *Railroad Co. v. Koontz* (104 U. S., 11); *Shaw v. The Quincy Mining Co.* (145 U. S., 444). In the latter case the court said:

By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad.

There are decisions to the contrary, but they are in the minority. In the case of the *United States v. Copper Queen Mining Company* (60 Pac., 885), a case in which the cutting was done by one named Ross, who sold and delivered timber to said company, a New York corporation doing business in the Territory of Arizona, the court decided in favor of the corporation, on the ground that said Ross was a resident of the territory, he having been for ten years engaged in the timber business within that vicinity. This case practically decided that an *alien*, as well as a *citizen*, was entitled to cut timber under the act of June 3, 1878, when he could show that he was a *bona fide resident* of the state. This case did not, however, hold that a foreign corporation was a resident of the state within the meaning of the act. In the case of the *United States v. Basic Company* (121 Fed., 504), a New Jersey corporation doing business in the State of Idaho, the court decided in favor of said company, which had *pur-*

*chased* timber from certain sawmill owners who were *themselves residents* of the state. The question of the residence of said corporation, within the meaning of the act, did not arise.

There can be no doubt, from the aforesaid decisions, that a foreign corporation is only a resident of the state in which it was incorporated, unless, by some *legislative act*, it is made a *domestic* corporation within the state in which it conducts its business outside of the state in which it is incorporated.

The present laws of Idaho governing foreign corporations contain the following provision in section 2792 of the Code of 1909:

*Provided, that, foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right of eminent domain, and shall be subject to the laws of the state applicable to like domestic corporations;—*

and section 7, article 11, of the constitution enacted January 12, 1909, provides for a formal acceptance of the constitution by foreign corporations.

In a similar case (B-1) you contended that *this provision* made a foreign corporation a *bona fide resident* of the State of Idaho within the meaning of *bona fide resident* as contained in the act of June 3, 1878; and that the fact that the aforesaid provision granted to foreign corporations the right of eminent domain did not limit the privileges granted to a mere service of process; that, in fact, it would be an unjust discrimination against a foreign corporation complying with this provision not to grant it the privilege of cutting timber from the public lands.

A corporation does not lose its residence and citizenship in the state of its creation from the mere fact that the bulk of its property and business lies in another state (*Wilkinson v. Delaware, etc., R. Co.* (22 Fed., 353), nor does it gain a residence in such other state by the mere fact of purchasing and using property therein (*Crowley v. Panama R. Co., 30 Barb., N. Y., 99*), nor is a foreign corporation necessarily *domesticated* by complying with a *domestic statute* requiring foreign corporations to register, to pay certain taxes, or to appoint a resident agent, or to submit to other prescribed conditions (*re Peter Schoenhofen Brewing Co., 8 Pa. Super. Ct., 141; Boyer v. N. P. R. Co., 8 Idaho, 74; 66 Pac., 826*); but it *may* have this effect if the *domestic statute* says so *in terms*.

The question whether the legislature of a state has adopted and domesticated a corporation created by another state is in each case purely a question of *legislative intent*, to be determined upon the construction of the statutes of the state to which such action of adoption and domestication is sought to be imputed (*James v. St. Louis, etc., R. Co., 46 Fed., 47; Uphoff v. Chicago, etc., R. Co., 22 Fed. Cases, 13185*).

In the case of *St. Louis & S. F. R. Co. v. James*, it was held that a railroad company incorporated in Missouri was not a citizen of Arkansas as far as jurisdiction by the United States Circuit Court was concerned, although having filed with the Secretary of State a certified copy of its articles of incorporation (161 U. S., 545).

The Revised Statutes of Idaho, 1887, section 2653, also contained a provision relative to the requirements to be fulfilled by foreign corporations in order to entitle them to the *rights and privileges* of like domestic corporations; and that statute also contained the same proviso, in exact words, as is contained in section 2792, *supra*, including the phrase "*right of eminent domain*."

The Supreme Court of Idaho made a ruling upon section 2653, *supra*, in the case of *Boyer v. Northern Pacific Railway Company* (8 Idaho, 74; 66 Pac., 826), in which it interpreted the statute, holding that the provision that foreign corporations complying with the provisions of section 2653 of the Revised Statutes of Idaho have all the rights and privileges of like domestic corporations, and are subject to the laws of the State of Idaho applicable to like domestic corporations, does not make a foreign corporation a resident of the State of Idaho.

It further says:

A foreign corporation doing business in this state does not acquire a fixed residence in this state by designating an agent upon whom process may be served, as required by the provisions of section 2653 of the Revised Statutes, and the decision in the case of *Easley v. New Zealand Insurance Company* (4 Idaho, 205; 38 Pac., 405), announcing a different rule, expressly overruled. (Syllabus by the Court.)

This case, decided by the highest authority in the State of Idaho, as far as is known by this office, has never been overruled, and is, therefore, the law now. As the proviso in the later statute is the same as that in the earlier statute, the ruling is as applicable to the former as it was to the latter. This shows that your contention is not supported by authority.

In view of the foregoing decisions, and the terms of the legislative act of Idaho, as contained in section 2792 of the Code of 1909, this office is not of the opinion that the *State of Idaho* has domesticated foreign corporations to such an extent as to make them residents thereof, since it merely states that foreign corporations shall have *all the rights and privileges* of like domestic corporations, and *does not say* that they *shall be* domestic corporations, which is interpreted to mean rights and privileges of carrying on business operations and protection of the same, *merely an act of comity*.

The contention has been made that when the act of June 3, 1878, was enacted, not even domestic corporations were intended to come within the meaning of the act; and that, since the Department has

construed the act so liberally as to include not only domestic corporations but even cities and counties, it should also extend its ruling so as to include foreign corporations doing business wholly within the state. This contention does not appear to be well taken. Whatever was contained in the debates leading up to the enactment of the act, the act itself contains nothing to show that domestic corporations should be excluded. If that had been the intention of Congress, and if the act had been wrongly construed in that respect, it would be no reason for further wrongfully construing the act.

There can arise but one other question, the intention of Congress in inserting the phrase "*and other persons, bona fide residents.*" It might be contended that all *citizens* of the United States, *whether bona fide residents or not*, were entitled to said timber; and that *other persons*, namely, *aliens*, *when bona fide residents* of the state, were entitled to the privileges of the act; and that, since the Centerville Mining & Milling Company is a citizen of the United States, it would be entitled to cut said timber; but this office is of the opinion that the act as worded intended that *each applicant* desiring to cut timber should be a *bona fide resident* of the state, and, therefore, that the aforesaid contention would not stand. The fact that said corporation was incorporated in a *territory* and not in a state does not affect this case (*Adams Express Co. v. Denver, etc., R. Co.*, 16 Fed., 712).

This office, therefore, holds that the said corporation is *not a bona fide resident of the State of Idaho* within the meaning of *bona fide resident* as contained in the act of June 3, 1878 (20 Stat., 88); and that the granting of said application must, therefore, be rejected.

This holding may seem to work a hardship as far as foreign corporations having their property invested in another state are concerned, and it may seem upon its face to be an unfair discrimination against foreign corporations. However, this office believes that that is a question to be remedied by *legislation* and not by any manner of interpretation of the said act.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE, *First Assistant Secretary.*

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McKEEN v. JOHNSON.

Motion for review of departmental decision of April 14, 1910, 38 L. D., 563, denied by First Assistant Secretary Pierce, July 9, 1910.

**RAILROAD RIGHT OF WAY—POWER SITES—EXAMINATION OF LAND  
PRIOR TO APPROVAL OF APPLICATION.****CONTINENTAL TUNNEL RAILWAY COMPANY.<sup>a</sup>**

Where an application for railroad right of way covers public lands upon which are possible power sites, examination should be had by the land department, before acting upon the application, to determine whether the lands may be utilized to the best advantage for power sites or other power purposes; and if it appear that the public good resultant from withholding the land for power development is disproportionate to the benefits to be derived from construction of the railroad, the application should be approved, even though it might interfere with development of the power; but if, on the other hand, the power possibilities are sufficient to justify utilization of the public lands for such purposes to the exclusion of other uses which may conflict, the lands should be withdrawn and the application rejected, unless the line of road can be so located as not to interfere or conflict with the use of the land for power purposes.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.)                      *Land Office, July 11, 1910.*                      (E. F. B.)

By letter of May 24, 1910, you transmit the appeal of the Continental Tunnel Railway Company from the decision of your office of February 17, 1910, requiring it to stipulate that it will, upon proper request, elevate or move its tracks and roadbed in the event of the present or future withdrawal for power purposes of any portion of the public lands over which such right of way passes. Said stipulation was required as a prerequisite to the approval of the right of way in accordance with the regulations of May 21, 1909 (37 L. D., 787), and the addenda to said regulations approved January 29, 1910 (38 L. D., 405), to carry into effect the provisions of the act of March 3, 1875 (18 Stat., 482), granting to railroads rights of way through the public lands of the United States.

The company declines to enter into the required stipulation, for the reason that it can not risk the construction of the proposed road, at an estimated cost of \$5,500,000, requiring not less than three or three and one-half years to construct, upon such condition.

The right of way applied for is for a line of railway 9.35 miles in length, for the purpose of connecting the Denver, Northwestern and Pacific Railway east and west of the Continental Divide, by means of a tunnel 6.04 miles in length, with an approach on the east of 1 mile and a fraction, and an approach on the west of about 2 miles.

It is stated in the appeal that at either end of the proposed tunnel is a small mountain stream, sufficient to supply water for the necessary wants of the railway, but insignificant when considered as a

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<sup>a</sup> See Skagit Power Co. (39 L. D., 89).

source of supply for any power development; that the approaches to the tunnel have a maximum 2 per cent grade along narrow, rough, and rugged valleys in the heart of the Rocky Mountains, and because of the physical condition and owing to the maximum grade designed and adopted so as to allow the tunnel grade to connect with the grade of the Denver, Northwestern and Pacific Railway on either side of the Continental Divide, it would be impossible to change either the alignment or grade over any part of the 9.35 miles.

It does not appear that the public lands affected by the right of way in question have been withdrawn for power-site purposes, or that the streams flowing across them are susceptible of such development of power as to warrant a withdrawal of any lands for use as power sites or for power purposes. Nor does it appear that the use of the right of way applied for will in any manner affect or prevent the utilization of the streams east and west of the tunnel to the full extent that the power afforded by such streams is capable of development.

On the contrary, it is insisted that the right of way applied for will not prevent the "successful utilization of these streams for such insignificant power development purposes as are possible." It is stated that South Boulder Creek, on the east of the divide, having its extreme head or source near James Peak, about  $4\frac{1}{2}$  miles above the eastern portal of the tunnel, is ordinarily about 12 feet wide, carrying from 6 to 8 inches of water, and is crossed only twice by the right of way; that Frazier River on the west, heading 6 miles south of the tunnel at Berthoud Pass, is ordinarily about 20 feet wide, carrying from 8 to 10 inches of water, and is crossed by the right of way but once.

It is stated that neither of these streams is suitable or sufficient for any power development and "in case any small water power is developed the utilization of it can be effected without any movement of alignment or change in grade in said Continental Tunnel Railway."

If that condition exist it is not probable that the company will ever be called upon to change either the alignment or grade of its road, and in that event nothing would be gained by the Government or lost to the company by the signing of the required stipulation. But the undertaking is too extensive and the required expenditure too great to rest upon the hazard of a contingency, especially where the conditions are such that it would be impracticable to change the approaches to the tunnel, either as to alignment or grade, after they are once fixed.

No right is acquired under the act of March 3, 1875, as against the United States by the simple filing of the articles of incorporation and the maps of location therein provided for, until the approval thereof by the Secretary of the Interior. At any time before such approval

the land may be reserved from sale by Executive authority for uses authorized by law which would defeat the application, as it is expressly provided by the fifth section of the act that the grant therein provided for shall not apply to any lands within the limits of any military park or Indian reservation "*or other lands specially reserved from sale,*" unless such right of way shall be provided for by treaty stipulation or by act of Congress.

The act of June 25, 1910 (Public, No. 303), authorizes the President in his discretion to make withdrawals of public lands for certain purposes, including "water-power sites," which withdrawals remain in full force and effect until revoked by him or by an act of Congress. Certain claims and rights are excepted from the force of such withdrawals, but it is sufficient to state that an application for a right of way under the act of March 3, 1875, is not included therein.

It is therefore essential that it be definitely determined whether the lands upon which this right of way is located could be utilized to the best advantage as power sites or for other power purposes before acting upon the application, in order that the company's rights under the statute may be definitely ascertained.

To that end you should require an examination to be made for the purpose of ascertaining whether the lands over which the right of way passes are so situated with reference to water courses capable of power development of such magnitude as to require the withdrawal of said lands for power sites, and whether the use of said lands is essential to the development of such power. If it be found that the use of such lands is necessary for that purpose, you should also ascertain whether the right of way as located, both as to alignment and grade, will interfere with the development of the power, in which event applicant should be so advised and should be required to change its line, if it can be so located as not to interfere with the use of the land for power purposes. If it refuse to make such change the application will be rejected.

If, however, it be found that the streams crossed or in the vicinity of the lands in question are not capable of such power development as to justify the withdrawal of lands for power sites, or if the line of road as located will not interfere with the development of such power as the stream may be capable, or if other lands may be used with equal or greater advantage for the development of such power, the application should be approved without requiring the company to enter into the stipulation prescribed in the regulations above referred to, if the application is proper in all other respects.

The land should either be withdrawn absolutely and the application rejected, or the application should be approved, and any further withdrawal should be subject to the right of way.



In making such examination you should be controlled to a great extent by the comparative benefits that will result to the public by the respective uses to which the land may be applied and to what extent the development of power is capable by the use of such lands.

If the public good resultant from withholding the land for power development is disproportionate to the benefits that will result from the extensive reduction of mileage in a continental road by means of the proposed tunnel, the application should be approved, even though it might interfere with the development of power. But if, on the other hand, the streams are capable of such extensive power development as to justify the utilization of public lands for such purpose to the exclusion of other uses which may conflict, a withdrawal of the lands should be made and the application should be rejected, unless the line of road can be so located as not to interfere or conflict with the use of the land for power development purposes.

Such action should be taken upon all similar applications.

The papers are returned to your office for further action in accordance with the instructions herein contained.

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#### RAILROAD RIGHT OF WAY—POWER SITES—STIPULATION.

##### SKAGIT POWER COMPANY.

Instructions of January 29, 1910, 38 L. D., 405, requiring applicants for railroad rights of way over public lands upon which are possible power sites to file, as a prerequisite to approval thereof, a stipulation that applicant will, upon proper request, elevate or move its tracks and roadbed in event of withdrawal for power purposes of any portion of the public lands over which the right of way passes, vacated and annulled.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 22, 1910.* (E. F. B.)

By letter of July 15, 1910, you submitted for approval a map filed by the Skagit Power Company, under the act of March 3, 1875 (18 Stat., 482), showing the definite location of its railroad from a point in Sec. 8, T. 38 N., R. 11 E., to a point in Sec. 21, T. 37 N., R. 12 E., W. M., Seattle land district, Washington, in connection with its application for right of way for its line of road under the provisions of said act.

It appears from your letter that the land affected by the proposed right of way is within the limits of a national forest, but favorable reports on the application have been made by the Forest and Reclamation Services that the application has been examined and found to conform to the regulations and the map conforms to the township plats. You also state that the company has filed a stipulation relating

to power sites required by the regulations. Further than the acceptance of said stipulation, it does not appear that you have considered to what extent any of the land traversed by said line of right of way could be more advantageously used as a power site or otherwise.

The map is therefore returned to your office for further consideration and action in the light of the rule announced in Continental Tunnel Railway Company (39 L. D., 86), which was designed to apply to all applications for right of way where the land, or any part thereof, has any power possibilities.

It was intended by said decision to annul the instructions of January 29, 1910 (38 L. D., 405), and said instructions are hereby formally vacated and annulled.

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**REPAYMENT—HOMESTEAD IN RECLAMATION PROJECT—FEES AND COMMISSIONS ON EXCESS OVER FARM UNIT.**

CHARLIE M. L. DALEY.

Where a homestead entry is allowed subject to adjustment to a farm unit, when established, under the reclamation act, the entryman is entitled, upon such adjustment, to repayment of the fees and commissions paid on the land entered in excess of that finally allowed him.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(O. L.) *Land Office, July 13, 1910.* (J. R. W.)

Charlie M. L. Daley appealed from your decision of March 25, 1910, denying his application for return of fees and commissions paid by him on homestead entry 02225, June 3, 1904, for E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 35, T. 9 S., R. 22 E., Hailey, Idaho.

Daley entered 160 acres described as S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 35, and was allowed "subject to adjustment under provisions of act of June 17, 1902," Minidoka Project. On fixing of farm units he was required to adjust his entry and selected unit G, W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 35, 80 acres, relinquished E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ . On his application for repayment of fees and commissions paid on the land entered in excess of that finally allowed him you held that—

It is held by this office that having made entry subject to the rules governing the establishment and disposal of "farm units" he elected to enter a full 160 acres wholly at his own risk as to the quantity of land that might eventually fall to him, and that repayment on the tract eliminated from his entry is not authorized by either the act of June 16, 1880, or that of March 26, 1908, the only statutes under which repayment may be made.

His appeal states that repayment in like cases has been made to others and inquiry at your office discloses that such repayments were

made up to July 13, 1908, but have since been declined. The act of June 16, 1880 (26 Stat., 287, Sec. 2), authorizes repayment—

in all cases where homestead or timber culture or desert land entries, or other entries of public land, have heretofore or shall hereafter be cancelled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed.

The act of March 26, 1908, Sec. 2 (35 Stat., 48), provides:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was legally required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

It is true that at the time this entry was made, regarding it as an entry for the whole amount of land and to be finally carried to patent as such, there was no excess payment. In other words, had this been an entry which in the practice of the land department was one that in due course would be carried to patent for its whole amount there was no excess payment, but in fact it was not such an entry. It was an entry which, upon the face of the certificate, was noted as conditioned and was dependent upon some further action of the land department by which its area might be reduced, but the entry would not have been allowed and Daley could not have exercised his right for its protection to the full extent allowed by law without payment of the fees paid. It was in that sense exacted of him because it was made by him necessarily under the rules of practice for the protection of an existing right which he desired then to exercise and preserve and could not otherwise have exercised and preserved. Such a payment is not voluntary because the authority receiving it exacts and demands of the person paying for protection of his right.

By decisions too numerous to need citation all the several steps taken in the history of the entry are regarded as taken at one and the same time, that is, they all have relation to the initial act. Had all things in this case been done at the same time or on the same day the taking of this money as a condition to Daley's entry of eighty acres would be an arbitrary exaction simply, without authority of law, but that is the exact effect of a proper application of the doctrine of relation. It is not Daley's fault that he is not permitted to obtain title for 160 acres. That results from the Reclamation Act which limits the amount he may take to the future adjustment and determination of the Land Department and Reclamation Service. The effect of it is that he has been required to pay an excess over what should have been paid or he could have been required to pay had it been possible for all the acts in the history of his entry to be done at one time.

In view of the Department the right for repayment in this case arises under either statute. The United States has exacted and

received from Daley a sum of money in excess of what it could lawfully require and in equity and good conscience is bound to return it. Congress has provided for just that condition of affairs.

Your decision is reversed and the repayment is allowed.

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**NATIONAL FOREST HOMESTEADS—TEMPORARY WITHDRAWALS FOR  
FOREST PURPOSES—ACT OF JUNE 11, 1906.**

L. C. HOWELL.

Lands temporarily withdrawn with a view to inclusion in a national forest are not subject to entry under the provisions of the act of June 11, 1906.

*Acting Secretary Pierce to the Secretary of Agriculture, July 13,*  
(O. L.) 1910. (S. W. W.)

My attention has been informally invited to the Department's letter addressed to you on June 2, 1910, regarding the application of one L. C. Howell, to make entry under the act of June 11, 1906 (34 Stat., 233), for a certain tract of land in section 5, township 45 north, range 6 east, Mt. Diablo Meridian, California. It was stated in that letter that the land was not included within the Modoc National Forest, as had been alleged, but was merely included within a temporary withdrawal made December 13, 1904, and as it was expected that the land would be irrigable under the Klamath project it was not considered advisable to restore the same. It was further stated in that letter that entry under the act of 1906 could not be made of lands temporarily withdrawn for forest purposes.

It appears from memoranda and correspondence informally submitted to this Department that a number of applications for lands included within temporary withdrawals have been listed and in several cases the lands have been opened to entry by the Secretary of the Interior, and inasmuch as such action does not accord with the views expressed in this Department's letter of June 2, 1910, reconsideration of the matter is requested.

It has been ascertained from informal inquiry made at the General Land Office that lands which have been temporarily withdrawn with a view to including them in national forests have, as a matter of fact, been restored to entry under the provisions of the act of June 11, 1906, and the authority for such action is said to have been based upon the language of the first section of the act which provides that the Secretary of Agriculture may examine and ascertain as to the location and extent of lands within permanent or *temporary* forest reserves and file lists of the same with the Secretary of the Interior with request that such lands be opened to entry in accordance with the provisions of the homestead law and the said act of 1906.

While the purpose of Congress in using the terms "permanent" and "temporary" forest reserves does not clearly appear, there would seem to be no reason whatever for assuming that by the use of those terms Congress intended to modify or repeal the twenty-fourth section of the act of March 3, 1891 (26 Stat., 1095), by which the authority to create forest reserves is imposed on the President. Prior to the passage of the act of 1906 lands included within a forest reserve could be eliminated only by proclamation of the President under authority of law, or by some act of Congress, and the act of 1906, therefore, was passed for the purpose of affording more expeditious methods of restoring to entry agricultural lands included in forest reserves. No such authority was needed for the purpose of restoring lands which had been temporarily withdrawn only with a view to including them within forest reserves, and it can not be presumed that Congress intended to confer authority to do that which might have been done in the absence of any such authority.

Lands are withdrawn at the instance of the Department of Agriculture to the end that they may be examined for the purpose of ascertaining whether or not they should be included in a forest, and it is not until after it has been definitely ascertained that the lands so withdrawn are suitable for such purpose that they are made a part of a forest, and that is accomplished by a proclamation of the President, as provided by statute. Until the lands are so included within a forest they in no sense form a part of a forest reserve and it is not believed that they are subject to the operation of the act of 1906.

Of course, this Department will be pleased to receive information from officers of the Forest Service as to the character of the lands temporarily withdrawn with a view to their subsequent inclusion in a national forest, and upon being advised as to the agricultural character of lands which have been so withdrawn, this Department will promptly restore the same to the public domain, subject to disposition under the general laws.

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**PROVISO TO SECTION 7, ACT OF MARCH 3, 1891—SOLDIERS' ADDITIONAL ENTRIES.**

THOMAS A. CUMMINGS.

The proviso to section 7 of the act of March 3, 1891, extends only to the classes of entries specifically mentioned therein, which require acts of the entryman to be performed on the ground, and does not embrace soldiers' additional entries.

James G. Harris, 28 L. D., 90; *Phillips v. Breazeale's Heirs*, 19 L. D., 573; and *Carroll Salsberry*, 17 L. D., 170, overruled.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 15, 1910.* (J. R. W.)

Thomas A. Cummings appealed from your decision of April 13, 1910, requiring him to furnish additional soldiers' right to perfect his entry under section 2306, Revised Statutes, for the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 8, T. 22 N., R. 14 E., forty acres, Lewiston, Montana.

November 14, 1906, Cummings presented application for entry based on two fractional soldiers' additional rights, aggregating 20.87 acres. May 17, 1907, application was erroneously allowed, and final certificate issued of that date. The entry was for a time suspended for investigation as to its coal or non-coal character. January 29, 1910, it was ascertained to be of non-coal character. April 13, 1910, you required Cummings to furnish further additional rights to bring his application within the rule of approximation fixed by decision of May 13, 1908 (36 L. D., 417), in case of George E. Lemmon.

The appeal assigns error because the final certificate was issued more than two years prior to your decision, and no protest or contest had been filed against the entry within that time, wherefore it is claimed the entry was confirmed for patent under the proviso to section 7 of act of March 3, 1891 (26 Stat., 1095); and, second, because the decision in Lemmon's case, *supra*, was not rendered until after Cummings's application had been allowed by you, wherefore the matter is *res adjudicata*, and should not be disturbed by change in departmental rulings.

The proviso to section 7 of the act of 1891, *supra*, is that:

After the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

While a soldiers' additional right is generally classed as a homestead, it is not in fact a homestead entry. Cornelius J. MacNamara (33 L. D., 520); William M. Wooldridge (33 L. D., 525). It is a right to make private entry by a soldier who in his original entry obtained less than one hundred and sixty acres prior to passage of the act making the grant. It amounts to a scrip, or special consideration for private entry of land. Since the decision in *Webster v. Luther* (163 U. S., 331), the rights are recognized by the land department as assignable. Entries of this class require no acts of residence, cultivation, or improvement on the land so entered. The proviso above quoted, under which confirmation of this entry was claimed, was considered and construed in the Court of Appeals, District of Columbia,

in suit of United States *ex rel.* Gribble *v.* Ballinger (33 Appeal Cases, District of Columbia, 211, 215), where the court said:

If the word was intended to be used in the generic sense in the proviso, there was no occasion whatever for preceding it with the particular recital of entries under the homestead, timber-culture, and desert-land laws. As entries under those laws constitute pre-emptions in the broad sense of the word, their recital would be of no effect unless the word be given its limited signification. And, as all the words of a statute are to be given effect, if reasonable, in its construction, the special recital would seem to indicate that Congress intended that pre-emption should have this restricted meaning. Under the laws recited, either actual settlement and residence, or the actual expenditure of labor and money in improvements upon the land so pre-empted, is required. In all such cases, inspection could be made at any time, and would necessarily show whether the law had been complied with. Under a timber and stone entry, on the other hand, the purchaser is not required to occupy the land or improve the same. He is required to do nothing beyond making the entry and paying the purchase money. Frauds perpetrated in such entries would necessarily be more difficult to detect than in the others. This would reasonably account for an intention to limit the scope of the proviso to the technical pre-emptions and those of the other classes specifically named.

It is true that the Department has given the broadest possible signification to the words preemption and homestead laws in construction of this proviso. Instructions of June 3, 1904 (33 L. D., 10), were to that effect. The decision in James G. Harris (28 L. D., 90) extended benefit of the proviso to coal entries. Phillips *v.* Breazeale's Heirs (19 L. D., 573), and Carroll Salsberry (17 L. D., 170) gave benefit of the statute to soldiers' additional homestead entries.

In view of the Department, under light of the carefully considered and well reasoned decision of the Court of Appeals referred to, such construction is held erroneous and will not longer be followed. The benefit of the proviso will be extended only to the classes of entries specifically mentioned therein, which require acts of the entryman to be performed on the ground—like improvement, residence, and cultivation—as required by law in entries of the specific classes named. The decisions above cited to the contrary are overruled. The first assignment is therefore held to be insufficient.

As to the second assignment, it is clear the additional rights assigned were insufficient in amount under the rule of approximation fixed by the Department. After much consideration, the rule of approximation fixed in the Lemmon case has been found essential to prevent abuse of the rule for approximation established as a mere administrative necessity. It is not of right that a party is entitled to approximate the area entered to that of the right offered. The rule established for convenience of administration was abused by deliberate splitting up of rights so as to aggregate slightly more than twenty acres where forty acres were desired to be entered. That

matter has been given the most careful consideration of the Department in repeated decisions, and the result arrived at in the Lemmon case is adhered to.

Your decision is affirmed.

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ENLARGED HOMESTEAD IN IDAHO—ACT OF JUNE 17, 1910.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 18, 1910.*

REGISTERS AND RECEIVERS,

*United States Land Offices in Idaho.*

GENTLEMEN: The following instructions are issued for your guidance in the administration of the act of Congress, approved June 17, 1910 (Public, 214), entitled "An act to provide for an enlarged homestead," copy of which may be found at the end of these instructions.

HOMESTEAD ENTRIES FOR 320 ACRES—KIND OF LAND SUBJECT TO SUCH ENTRY.

1. The first section of the act provides for the making of homestead entry for an area of 320 acres, or less, of arid, nonmineral, nontimbered, nonirrigable public land in the State of Idaho.

The terms "arid" or "nonirrigable land," as used in this act, are construed to mean land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as "dry farming," and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost.

Therefore, lands containing merchantable timber, mineral lands, and lands within a reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply, may not be entered under this act. Minor portions of a legal subdivision susceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under this act, provided, however, that no one entry shall embrace in the aggregate more than 40 acres of such irrigable lands.

DESIGNATION OR CLASSIFICATION OF LANDS—APPLICATIONS TO ENTER.

2. From time to time lists designating the lands which are subject to entry under this act will be sent you, and immediately upon receipt



of such lists you will note upon the tract books opposite the tracts so designated, "Designated, act June 17, 1910." Until such lists have been received in your office, no applications to enter should be received and no entries allowed under this act, but after the receipt of such lists it will be competent for you to dispose of applications for lands embraced therein under the provisions of this act, in like manner as other applications for public lands, without first submitting them to the General Land Office for consideration.

The fact that lands have been designated as subject to entry is not conclusive as to the character of such lands, and should it afterwards develop that the land is not of the character contemplated by the above act, the designation may be canceled, but where an entry is made in good faith under the provisions of said act, such designation will not thereafter be modified to the injury of any one who, in good faith, has acted upon such designation. Each entryman must furnish affidavit as required by section 2 of the act.

#### COMPACTNESS—FEES.

3. Lands entered under this act must be in a reasonably compact form, and in no event exceed  $1\frac{1}{2}$  miles in length.

The act provides that the fees shall be the same as those now required to be paid under the homestead laws; therefore, while the fees may not in any one case exceed the maximum fee of \$10, required under the general homestead law, the commissions will be determined by the area of land embraced in the entry.

#### FORM OF APPLICATION.

4. Applications to make entry under this act must conform to the forms prepared for use under the act of February 19, 1909, 35 Stat., 639 (see circular December 14, 1909, 38 L. D., 361), except that such forms must be properly modified as to the date of the act. A supply of these blanks will be furnished you. Applications to enter must be submitted upon affidavit Form No. 4-005, properly modified.

The affidavit of applicant as to the character of the lands must be corroborated by two witnesses. It is not necessary that such witnesses be acquainted with the applicant, and if they are not so acquainted their affidavit should be modified accordingly.

#### ADDITIONAL ENTRIES.

5. Section 3 of the act provides that any homestead entryman of lands of the character described in the first section of the act, upon which entry final proof has not been made, may enter such other lands, subject to the provisions of this act, contiguous to the former entry, which shall not, together with the lands embraced in the

original entry, exceed 320 acres, and that residence upon and cultivation of the original entry shall be accepted as equivalent to residence upon and cultivation of the additional entry.

This section contemplates that lands may, subsequent to entry, be classified or designated by the Secretary of the Interior as falling within the provisions of this act, and in such cases an entryman of such lands who had not at the time of the classification or designation of the lands made final proof, may make such additional entry, provided he is otherwise qualified. Applicants for such additional entries must, of course, tender the proper fees and commissions and must make application and affidavit on the Form No. 4-004, properly modified as to date of the act. Entrymen who made final proof on the original entries prior to the date of the act or prior to the classification or designation of the lands as coming within the provisions of the act are not entitled to make additional entries under this act.

FINAL PROOFS ON ORIGINAL AND ADDITIONAL ENTRIES—COMMUTATION NOT ALLOWED.

6. Final proofs must be made as in ordinary homestead cases, and in addition to the showing required of ordinary homestead entrymen it must be shown that at least one-eighth of the area embraced in each entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the third year of the entry and continuing to date of final proof.

Final proof submitted on an additional entry must show that the area of such entry required by the act to be cultivated has been cultivated in accordance with such requirement; or, that such part of the original entry as will, with the area cultivated in the additional entry, aggregate the required proportion of the combined entries, has been cultivated in the manner required by the act.

Proof must be made on the original entry within the statutory period of seven years from the date of the entry; and if it can not be shown at that time that the cultivation has been such as to satisfy the requirements of the act as to both entries it will be necessary to submit supplemental proof on the additional entry at the proper time. But proof should be made at the same time to cover both entries in all cases where the residence and cultivation are such as to meet the requirements of the act.

Commutation of either original or additional entry, made under this act, is expressly forbidden.

## RIGHT OF ENTRY.

7. Homestead entries under the provisions of section 2289 of the Revised Statutes, for 160 acres or less, may be made by qualified persons within the State named upon lands subject to such entry, whether such lands have been designated under the provisions of this act or not. But those who make entry under the provisions of this act can not afterwards make homestead entry under the provisions of the general homestead law, nor can an entryman who enters under the general homestead law lands designated as falling within the provisions of this act afterwards enter any lands under this act.

A person who has, since August 30, 1890, entered and acquired title to 320 acres of land under the agricultural-land laws (which is construed to mean the timber and stone, desert land, and homestead laws), is not entitled to make entry under this act; neither is a person who has acquired title to 160 acres under the general homestead law entitled to make another homestead entry under this act, unless he comes within the provisions of section 3 of the act providing for additional entries of contiguous lands, or unless entitled to the benefits of section 2 of the act of June 5, 1900 (31 Stat., 267), or section 2 of the act of May 22, 1902 (32 Stat., 203).

If, however, a person is a qualified entryman under the homestead laws of the United States, he may be allowed to enter 320 acres under this act, or such a less amount as when added to the lands previously entered or held by him under the agricultural-land laws shall not exceed in the aggregate 480 acres.

## CONSTRUCTIVE RESIDENCE PERMITTED ON CERTAIN LANDS.

8. The sixth section of the act under consideration provides that not exceeding 320,000 acres of land in the State of Idaho, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of this act; with the exception, however, that entrymen of such lands will not be required to prove continuous residence thereon. The act provides in such cases that, after six months from date of entry and until final proof, all entrymen must reside not more than 20 miles from the land entered and be engaged personally in preparing the soil for seed, seeding, cultivating and harvesting crops upon the land during the usual seasons for such work unless prevented by sickness or other unavoidable cause. It is further provided by said act that leave of absence from a residence established under this section may be granted upon the same terms and conditions as are required of other homestead entrymen.

Applications to enter under this section of the act will not be received until lists designating or classifying the lands subject to entry thereunder have been filed and noted in the local land offices. Such lists will be from time to time furnished the registers and receivers, who will immediately upon their receipt note upon the tract books opposite the tracts so listed, the words "Designated, section 6, act June 17, 1910." Stamps for making the notations required by these instructions will be hereafter furnished the local offices: Applications under this section must be submitted upon Form 4-003, properly modified as to date and section of the act.

FINAL PROOFS ON ENTRIES ALLOWED UNDER SECTION 6—RESIDENCE—  
COMMUTATION NOT ALLOWED.

9. The final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show that, from the expiration of six months after the date of original entry and until the time of making final proof, he resided not more than 20 miles from the land entered and was personally engaged in farming the same as required by said act. Such proof must also show that not less than one-eighth of the entire area of the land entered was cultivated during the second year; not less than one-fourth during the third year; and not less than one-half during the fourth and fifth years.

OFFICERS BEFORE WHOM APPLICATION AND PROOFS MAY BE MADE.

10. The act provides that any person applying to enter land under the provisions thereof, shall make and subscribe before the proper officer an affidavit, etc. The term "proper officer," as used herein, is held to mean any officer authorized to take affidavits or proof in homestead cases.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

FRANK PIERCE,

*Acting Secretary.*

[PUBLIC—No. 214.]

An Act To provide for an enlarged homestead.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivision, under the provisions of this Act, in the State of Idaho, three hun-

PROPERTY OF THE  
GENERAL LAND OFFICE

dred and twenty acres or less of arid nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body and not over one and one-half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this Act until the lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation, at a reasonable cost, from any known source of water supply.

SEC. 2. That any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this Act, and shall pay the fees now required to be paid under the homestead laws.

SEC. 3. That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

SEC. 4. That at the time of making final proofs as provided in section twenty-two hundred and ninety-one of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

SEC. 5. That nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the State of Idaho under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this Act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this Act shall be commuted.

SEC. 6. That whenever the Secretary of the Interior shall find that any tracts of land in the State of Idaho subject to entry under this Act do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate three hundred and twenty thousand acres, and thereafter they shall be subject to entry under this Act without the necessity of residence upon the land entered: *Provided*, That the entryman shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of said entry, and that after six months from date of entry and until final proof the entryman shall reside not more than twenty miles from said land and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work unless prevented by sickness or other unavoidable cause. Leave of absence from a residence established under this section may, however, be granted upon the same terms and conditions as are required of other homestead entrymen.

Approved, June 17, 1910.

**CONTEST—GOVERNMENT PROCEEDINGS—DISCRETION OF LAND DEPARTMENT—RIGHT OF CONTESTANT.****SANDERS v. PARKINSON.**

An application to contest an entry upon which final certificate has not issued, filed pending proceedings by the government on the report of a special agent, should be received and held subject to final determination of such proceedings; and should the government proceedings fail, the contestant is entitled to proceed against the entry as of the date his application was filed. Where after an adverse report by a special agent, but prior to direction to the register and receiver to issue notice thereon, as provided by paragraph 3 of instructions of November 25, 1907, a sufficient affidavit of contest is filed against the entry, the land department may, in its discretion, in the absence of any evidence of collusion between the proposed contestant and the contestee, suspend the government proceedings pending termination of the private contest.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 19, 1910.* (O. W. L.)

D. A. Sanders has appealed from your office decision of January 21, 1910, rejecting his contest affidavit against homestead entry No. 12081, made August 9, 1907, at Blackfoot, Idaho, for the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of Sec. 33, and the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Sec. 28, T. 6 N., R. 41 E., B. M. Commutation proof was offered October 15, 1908, but no final certificate issued, pending an investigation, the Chief of the Field Division having advised the register and receiver that there was a protest against the validity of the entry in his office.

The contest affidavit, filed in the local office November 11, 1908, transmitted November 14, 1908, and received in your office November 18, 1908, alleged that—

Said Frederick S. Parkinson has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law, and he has never maintained his residence upon said land, but resides with his family elsewhere and has maintained his residence elsewhere.

Upon November 7, 1908, a special agent made an adverse report upon the entry, the report being approved by the Chief of the Field Division November 12, 1908, and received in your office December 7, 1908. February 16, 1909, without taking any action upon Sanders's affidavit, your office directed the register and receiver to issue the following charges on this report:

(1) That the claimant did not establish and maintain residence on the land.

(2) That the entry was not made in good faith, for the use and benefit of claimant as a home, but for the benefit and use of the Smart-Webster Sheep Company.

On December 3, 1909, which was the first action your office took relative to Sanders's contest affidavit, the Chief of the Field Division was directed to make investigation in connection with this affidavit "in accordance with the circular of April 24, 1907," the same being a circular of your office relative to the substitution of a private contestant in government hearings where the entry is confirmed except for the Government's proceedings under the proviso to section 7, act of March 3, 1891. As there was no question of confirmation present, and, further, as that circular had been revoked March 22, 1909, the necessity for the ordered investigation is not apparent.

December 11, 1909, however, it was reported to your office that notice of charges had been issued by the register and receiver, as ordered, a hearing thereunder being held May 7, 1909. At this hearing the Government appeared by special agent, who introduced no witnesses on its behalf, but rested its case on the testimony of the entryman's witnesses. The register and receiver rendered their decision March 17, 1910, recommending that the commutation proof be rejected, but that the entry remain intact. From their decision the entryman filed an appeal, which is still pending in your office.

Your office rejected the contest affidavit in the following language:

Inasmuch as proceedings under circular of November 25, 1907, were directed upon report made by a special agent prior to the filing of the contest affidavit by Sanders, and as a hearing has now been had, the contest affidavit is rejected, subject to the usual right of appeal.

Said circular (36 L. D., 112, 178, 367) provides:

2. Upon receipt of the special agent's report this office will consider the same and determine therefrom whether the charges, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges.

The land department has the power to supervise all proceedings relative to the disposal of public lands, and to determine whether the contest against an entry shall or shall not be allowed (John N. Dickerson, 35 L. D., 67). The allowance of a contest affidavit is a matter resting within the sound discretion of your office, with which the Department will not ordinarily interfere. As a general rule, however, the Department sees no objection to permitting a contestant to proceed upon a sufficient affidavit of contest filed prior to the direction to the register and receiver to issue notice of charges, as provided in section 3 of the above circular, where there is no evidence of collusion between the proposed contestant and contestee, the government proceedings being held in abeyance pending the termination of the private contest.

The action of your office, however, in rejecting the contest affidavit, was erroneous. An application to contest such an entry upon which final certificate has not issued, filed pending proceedings on a report of a special agent, should be received and held subject to the final determination of such proceedings (*United States v. Scott Rhea*, 8 L. D., 578; *Conly v. Price*, 9 L. D., 490). If said proceedings fail, the contestant is then entitled to proceed against the entry as of the date when his application was filed (*Farrell v. McDonnell*, 13 L. D., 105).

In view of the above, and inasmuch as a hearing has been held upon the charges contained in the special agent's report, the matter is remanded, with instructions that you hold Sanders's contest affidavit subject to the final determination of the government proceedings, as above indicated.

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**RIGHT OF WAY—RESERVOIR SITE—JURISDICTION OF LAND DEPARTMENT.**

FRANCIS W. BOSCO ET AL.

Whether the United States has a prior, superior and paramount claim to waters of the Rio Grande to the extent necessary to enable it to keep its treaty obligations with the Republic of Mexico with reference to the delivery of such waters is a question not within the competency of the land department to determine, and the Secretary of the Interior will not embarrass the decision of such question, nor the fulfilment of the Nation's obligations under such treaty, by approving applications for rights of way under the act of March 3, 1891, which rest upon the appropriation of such waters under State laws and their proposed diversion to other and adverse uses.

The extent of the grant made by the act of March 3, 1891, is defined by the statute, and the Secretary of the Interior is not authorized to accord a qualified approval of applications filed thereunder for the purpose of limiting the estate thereby granted.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 19, 1910.* (G. B. G.)

This is the appeal of Francis W. Bosco and Cyrus Miller from your office decision of November 5, 1909, rejecting their joint application of July 8, 1909, under sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat., 1101), and section 2 of the act of May 11, 1898 (30 Stat., 404), for right of way for the Wagon Wheel Gap Reservoir, involving certain lands in Mineral County, Del Norte land district, Colorado.

The decision appealed from rests wholly upon a report of the Director of the Reclamation Service October 19, 1909, which stated that: "The approval of said application would constitute a serious interference with the Rio Grande Project now under consideration,"



and recommended that the application be rejected. The merits of the case were not discussed in said decision, and it may be here stated that your office raises no question as to the technical sufficiency of the application, and no such question has been mooted before the Department.

The applicants were accorded, and had, an oral hearing, and the case was most elaborately argued and has been most carefully considered, more especially as it involves some important and far-reaching questions. As preliminary to a consideration of these questions, it should be stated that the application of Bosco and Miller is predicated upon alleged prior appropriation of waters of the Upper Rio Grande, in the State of Colorado, sufficient to supply the proposed reservoir, which will hold, when completed, according to the survey thereof, 994,000 acre feet of water, and this survey covers certain public lands of the United States upon which the applicants must secure a right of way under federal laws. They seek to do this by the filing of maps under the provisions of the act of March 3, 1891, *supra*, for the approval of the Secretary of the Interior. The objection to such approval rests upon certain important and vital interests of the United States in the waters of the Rio Grande, in connection with its irrigation project in New Mexico, known as the Engle Dam Project, and the proposed storage of waters therein to the keeping of certain treaty obligations to the Republic of Mexico.

A controversy sometime arose between the United States and the Republic of Mexico relative to use of the waters of the Rio Grande, and was existent on December 5, 1896, when, because of such controversy, the then Secretary of the Interior promulgated the following order, addressed to the Commissioner of the General Land Office:

Your office is hereby directed to suspend action on any and all applications for right of way through public lands for the purpose of irrigation by using the waters of the Rio Grande River, or any of its tributaries, in the State of Colorado or in the Territory of New Mexico, until further instructed by this Department.

There were subsequent modifications of this order, but for the purposes of this case they are unimportant, except the last order on the subject, April 25, 1907, to which attention will be hereinafter given.

May 21, 1906, there was signed at Washington a convention between these sovereignties, Article 1 of which is as follows:

After the completion of the proposed storage dam, near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of sixty thousand acre-feet of water annually, in the bed of the Rio Grande at the point where the head works form Acequia Madre, known as the Old Mexican Canal, now existing above the city of Juarez, Mexico.

This convention was duly ratified by the contracting parties, and was proclaimed by the President of the United States January

16, 1907 (34 Stat., 2953). To carry out this treaty stipulation "in connection with the irrigation project on the Río Grande," Congress, by the act of June 4, 1907 (34 Stat., 1357), appropriated the sum of \$1,000,000 toward the construction of a dam on said river, and it appears from a report by the Director of the Geological Survey, April 27, 1910, that about \$500,000 has been expended in connection with the Engle dam. The total estimated cost of the project, including the dam, is \$7,000,000 to \$8,000,000. It further appears from said report that on June 27, 1906, the Secretary of the Interior entered into a contract with the Elephant-Butte Water Users Association and the El Paso Water Users Association, providing for the construction of the Engle Dam Project by the United States, and the repayment of the cost of such construction by these associations. In this status of the matter, on April 25, 1907, the then Secretary of the Interior approved a recommendation by the Director of the Reclamation Service as follows:

I therefore recommend that the Department lay down the general policy that until the development of irrigation on the Upper Rio Grande in the State of Colorado and the Territory of New Mexico shall furnish sufficient data to determine the effect of the storage and diversion of water in that vicinity upon the water supply for the Engle reservoir of the Rio Grande Project, no further rights of way be approved which involve the storage or diversion of waters of the Upper Rio Grande and its tributaries, except applications of two kinds: First, those in connection with which there is a showing that the rights of parties were initiated prior to the beginning of active operations by the Reclamation Service for the Rio Grande Project, namely, March 1, 1903; second, applications which involve the diversion or storage of not exceeding one thousand acre-feet of water per annum. When it becomes possible to determine the effect of the approved applications upon the water available for storage from the Rio Grande Project, it may be possible to allow the use of rights of way to a greater extent than is now supposed.

Manifestly, if this order was within the competency of the Secretary of the Interior to make, and is to stand, it results that the pending application of Bosco and Miller must be rejected. The application does not come within either of the exceptions named in said order, and may not be allowed except in violation thereof. After a most painstaking consideration of the entire subject with reference to the situation presented, the Department can not see its way clear to approve this application. It may, for the purpose of this case, be admitted that under ordinary circumstances the Secretary of the Interior is without discretion to withhold his approval of an application filed conformably to the act of March 3, 1891. But manifestly, here is a situation unusual and critical, which demands the exercise of such discretion. The paramount rights and interests of the United States are vitally involved in this proceeding. No question of the authority of the United States can well be urged in this proceeding. The power to make treaties with foreign nations has been

delegated by the States to the Nation, and is exclusive; and it is well settled that where such a power has been delegated the grant carries with it all subsidiary powers necessary to its exercise:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." . . . From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. (*Kansas v. Colorado*, 206 U. S., 46, 88.)

Moreover, the question is one not within the competency of the land department to determine, and this is sufficient reason to justify that Department in refusing to take any action which might in any way embarrass the United States in fulfilling its treaty obligations, or further complicate a question it is without right or jurisdiction to decide. It is not overlooked that the contention is made upon this record, and was presented at length at the oral hearing, that the diversion of water necessary to carry the Wagon Wheel Gap Project to completion will in nowise interfere with the storage of the necessary waters by the United States Engle dam, to enable it to keep both its treaty obligations with the Republic of Mexico and its contractual obligations with the water users associations above referred to. The Department is by no means convinced that this is true, and in the absence of such conviction it is believed to be the duty of the Secretary of the Interior to exercise such discretion as is necessary to protect the interests of the United States.

At the oral hearing it was suggested on behalf of the Secretary of the Interior that, in the event of a determination of the legality of the suggestion, if the applicants would accept an approval qualified by such language as would protect the interest of the United States in the Engle Dam Project, such qualified approval might be accorded. Counsel for the applicants were not at that time able to answer as to whether the applicants would be willing to accept such qualified approval; and since that time the Secretary of the Interior has caused to be examined the law with reference to this question, and in an opinion by the Assistant Attorney-General for this Department, June 14, 1910, referring to the essentially similar act of March 3, 1875, granting rights of way through the public lands of the United States to railroad companies in a case where it was sought to impose a limitation upon the approval of the Secretary provided for by that act, it was said:

The statute defined the extent of the grant, and in my opinion, upon compliance with the requirements of the law, the Secretary of the Interior is

without power either to expand or limit the same; the restriction being unlawful can accomplish nothing and is unenforceable.

In the present case, the question is resolved into whether the aforesaid order of April 25, 1907, reserving public lands on the waters of the Rio Grande from appropriation under the act of March 3, 1891, will be permitted to stand. As to the legality of such withdrawals there would seem to be no doubt; at any rate, for reasons already stated, this Department is not disposed to question their legality. If a serious question might have been made as to their legality in connection with the irrigation project of the United States in New Mexico standing alone, still, it seems plain that if the withdrawal of these lands was necessary to enable the United States to keep its treaty obligation with the Republic of Mexico (a fact which has already been determined), there would seem to be little room for question that the withdrawals were legally justifiable upon that ground alone. However this may be, the Executive arm of the Government has determined to uphold this policy to the extent of its power, and these questions may well be left to the courts, where they may ultimately go. There are involved in this case certain other kindred questions, among which is that of priority of appropriation of waters, the legality of appropriations by the United States, and lack of diligence in appropriation to a beneficial use. It might be argued with considerable force that the aforesaid treaty with Mexico in itself amounted to an appropriation of these waters to the extent of 600,000 acre-feet—an appropriation by the highest authority. But these questions also must finally be resolved by the courts. In the meantime the Government proposes to push the Engle Dam Project to completion with all possible dispatch; and to the end that it may be successfully operated and maintained, the withdrawal of April 25, 1907, will not be disturbed.

The decision appealed from is affirmed.

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**SOLDIERS' ADDITIONAL—REMARRIAGE OF WIDOW—SECTION 2307, R. S.**

WARREN W. WILLIAMS.

The right of additional entry conferred by the act of June 8, 1872 (now section 2307, R. S.), upon the widow of a soldier who made homestead entry for less than 160 acres, is lost to the widow if not appropriated during widowhood; and after remarriage, the widow's only interest in such right, if any, is as heir of the soldier.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 20, 1910.* (G. B. G.)

Warren W. Williams has appealed from your office decision of April 13, 1910, rejecting his application, filed September 1, 1908, as

assignee of Olive E. Terrill, now Church, widow of Lucien B. Terrill, deceased, to enter, under the provisions of section 2307, Revised Statutes, the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. 9, and the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of Sec. 10, T. 44 N., R. 56 E., Carson City, Nevada, containing 80 acres, based on the military service of Lucien B. Terrill in the army of the United States during the civil war, in Co. A, 23d Regiment, Michigan Infantry, from February 29 to June 25, 1864, as shown by a report from the War Department, and on H. E. No. 617, made by Lucien B. Terrill, at East Saginaw, Michigan, on September 16, 1863, for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Sec. 28, T. 12 N., R. 2 E., containing 80 acres, which was canceled for abandonment on April 10, 1866.

Your office decision holds:

As the widow of the soldier by her remarriage lost her right to appropriate the claimed additional right under the provisions of Sec. 2307, R. S., her assignment as such widow could not divest the soldier's estate of any such right as may have been vested therein, and while she may have some interest in his estate under the local statutes, it does not appear that under the statute of distribution of the State of Pennsylvania, she is entitled to more than a part of such estate as may be distributable among the heirs or next of kin, nor does it appear that administration on the soldier's estate has yet been had, and the claimed right sold and disposed of thereunder.

The appeal assigns a number of alleged errors, all of which appear to be based upon the allegation that said Olive E. Terrill remained unmarried until March 5, 1874, when, as alleged in the appeal, she married William McArthur. Summarized, the appeal in effect alleges that as Olive E. Terrill was unmarried at the date of the acts of June 8, 1872, and March 3, 1873 (17 Stat., 333 and 605), she "became entitled to make an additional homestead entry," and that the "said right was conferred upon her" by said acts, and "was not taken away by the reenactment thereof as sections 2306 and 2307, Revised Statutes, on June 22, 1874, and that it was not affected by the fact that on the latter date the said widow Terrill had remarried," and that her said right "was expressly preserved" by the provisions of sections 5595, 5596 and 5597, Revised Statutes.

This presents a new question, but, in the opinion of this Department, the contention is not well made. The act of June 8, 1872, *supra*, provides, pertinent to this inquiry—

That in case of the death of any person who would be entitled to a homestead under the provisions of the first section of this act, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this act, subject to all the provisions as to settlement and improvements therein contained.

This act was amended by the act of March 3, 1873, *supra*, but in a particular not here important.

Section 2307 of the Revised Statutes, taken from these acts, reads as follows:

SEC. 2307. In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter.

It will be observed that there is no real or substantial difference between the act of June 8, 1872, and the revision. The one is in almost the identical language of the other. Adjudications, therefore, of this Department with reference to section 2307 are controlling as to the effect of the act of June 8, 1872, and it can be set down as well settled that the widow of a soldier takes nothing by section 2307, except the privilege of appropriating the benefits of the statute, which privilege may be lost by coverture before application to exercise it (*John C. Mullery et al.*, 34 L. D., 333). By parity of reasoning, therefore, such widow takes nothing by the act of June 8, 1872, where she has failed to appropriate its privileges during her widowhood. It results that inasmuch as the widow secured no rights under the act of June 8, 1872, the provisions of sections 5595, 5596 and 5597, preserving rights attaching under acts of Congress before the adoption of the Revised Statutes, are without application to the question here presented.

The real question therefore involved is whether the former soldier's widow was entitled to the benefit of any soldier's additional right on March 11, 1907, the date of the assignment of the claimed additional right to Hubbell.

As stated in your decision, it is found from the evidence submitted, and from the records and files of your office pertaining thereto—

that the soldier who rendered said military service died on June 25, 1864, before the term of his enlistment had expired, leaving surviving him his widow, Olive E. Terrill, who, some time afterwards, married one McArthur who also died; that in the year 1885, she married one Church who died in 1891; that on March 11, 1907, in Crawford County, Pa., where the soldier resided in his lifetime, she, as the widow of said Lucian B. Terrill, assigned the claimed additional right to Lucius W. Hubbell, who in turn assigned the same to the applicant herein.

It thus appears that prior to the date of said assignment to Hubbell, she married her third husband, one Church. The widow took nothing under the statute if remarried. In that event the benefit of any right passed immediately to the minor orphan children, if there were such, otherwise to remain an asset of the soldier's estate, subject to disposition as other personal property (*Allen Laughlin*, 31 L. D., 256).

As the widow remarried without exercising the right, your office decision rejecting the application in question must be and the same is hereby affirmed—but this without prejudice to any right which she may have as the heir of the soldier, a question which has not been and need not be considered upon this record.

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STATE OF WYOMING.

Motion for review of departmental decision of March 29, 1910, 38 L. D., 508, denied by First Assistant Secretary Pierce, July 22, 1910.

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PUBLIC LANDS—EQUITABLE CLAIMANTS—ACT JUNE 25, 1910.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 23, 1910.*

REGISTER AND RECEIVER,  
*Wausau, Wisconsin.*

GENTLEMEN: The following regulations are promulgated under the act of June 25, 1910 (Private, No. 152):

The parties must first produce to the Commissioner of the General Land Office competent and satisfactory evidence of their equitable claim to the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 13, NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 24, T. 30 N., R. 13 W., 4th Principal Meridian, Dunn County, Wisconsin, separately, consisting of an abstract of title certified to by the Register of Deeds for Dunn County, Wisconsin, and affidavits fully setting forth the facts constituting their claim, and also the names and addresses of all claimants, occupants and owners, and whether there are any adverse claims, all corroborated by the affidavits of two disinterested and competent witnesses. You will allow no entries until first authorized.

After authorization, you will permit the claimant, or claimants, of each legal subdivision to apply to purchase the same at \$1.25 per acre under said act. You will then require the claimant, or claimants, to publish and post a notice of their applications for a period of thirty days and to submit proof of such publication and posting in substantial accordance with the circulars of February 21, 1908 (36 L. D., 278), and March 26, 1908 (36 L. D., 347), in so far as applicable. After production of such proof and the absence of adverse claims, you will issue a cash certificate and receipt in the name of the entry-

man, or entrymen, and transmit the same with your monthly returns in accordance with current instructions. You will exact no fees or commissions from the entryman, or entrymen. If adverse claims, protests or contests are filed, you will take appropriate measures to protect the rights of all parties in accordance with existing regulations.

Each legal subdivision must be separately entered, unless two or more are owned by the same person, or persons, in which event one entry only need be made of the tracts so owned. An entry on a fractional portion of a legal subdivision will not be allowed. If two or more persons each own an equal undivided interest in the whole of one of said legal subdivisions, they may make a joint entry. If such undivided interests are unequal, or if two or more persons each own different portions of one of said legal subdivisions, they may request that the certificate, receipt and patent issue in the name of a trustee, whom they must designate. In this event the parties must record a trust agreement in the office of the Register of Deeds for Dunn County, Wisconsin, fully detailing the terms of the trust, and submit the same to the Commissioner of the General Land Office, with evidence of such recordation.

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved, July 23, 1910:

FRANK PIERCE,  
*Acting Secretary.*

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[PRIVATE—No. 152.]

An Act Authorizing patents to be issued to the equitable claimants of certain lands therein described.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the equitable claimants of the southwest quarter of the southeast quarter of section thirteen, the northwest quarter of the northeast quarter, and northeast quarter of the northeast quarter of section twenty-four, all in township thirty north, of range thirteen west, fourth principal meridian, Dunn County, Wisconsin, under the erroneous location of military bounty land warrant numbered eighty-eight thousand and eighty nine, for one hundred and twenty acres, Act of March third, eighteen hundred and fifty-five, by Eleanor Buchanan, be, and they hereby are, authorized to purchase the said tracts or either of the said legal subdivisions upon payment of one dollar and twenty-five cents per acre, and the Secretary of the Interior is hereby authorized and empowered to issue a patent or patents to such equitable claimants upon payment of said purchase price: *Provided*, That said equitable claimants shall first produce to the Commissioner of the General Land Office, under such regulations as he may promulgate, competent and satisfactory evidence of their equitable claims to said tracts of land or any or either of them.

Approved, June 25, 1910.



## CLASSIFICATION OF MINERAL LANDS—ACTS FEBRUARY 26, 1895, AND JUNE 25, 1910.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., July 26, 1910.

## REGISTERS AND RECEIVERS,

*United States Land Offices at Helena, Bozeman, Missoula,  
Great Falls, Billings and Kalispell in Montana, and Coeur  
d'Alene in Idaho.*

In accordance with an act of Congress approved February 26, 1895, entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," as amended in Sundry Civil June 25, 1910 (Public, 266), plans for the co-operation of the U. S. Geological Survey have been approved, copy herewith inclosed [see 39 L. D., 116], and the following rules and regulations have been prepared for your observance and direction in the performance of the duties devolving upon you under said acts:

Under the act of February 26, 1895 (28 Stat., 683), providing for the classification of lands within the limits of the Northern Pacific Railroad Company's grants in your district, the government is required to pay the cost of the publication of such lists.

2. These advertisements must, therefore, be made in strict conformity to the requirements of the Department in such cases and must be authorized by the Secretary of the Interior in the manner provided for in form 1-427.

3. In order to meet said requirements, copies of such lists for publication must first be submitted for departmental approval. Such copies will be prepared by this office from the original report filed by the Geological Survey and will literally follow said report in the description of the tracts classified, without variation either in form or character of words, figures, or abbreviations. If found satisfactory, the copy will be approved in form and transmitted to you for publication under the conditions named in said form 1-427 as to rates, type and space. Under the act of February 26, 1895, *supra*, publication shall be made "at least once a week for four consecutive weeks." Publications made at the cost of the government should not be in excess of that actually required under the law.

4. Upon receipt of the approved copy from this office you will publish the same in two newspapers, one of general circulation in the county in which the land classified is located and the other published at the capital city of the State in which the lands are situated, once a week for four consecutive weeks.

5. In accordance with the foregoing, publication of notice of classification will require only four insertions, whether in a daily or a weekly paper; that is, if the notice is published in a daily paper it shall be published once a week for four consecutive weeks. You will instruct the publishers in accordance herewith, and payment will be based upon such publication. The publisher will also be required to submit a copy of each of the four issues of the paper containing the advertisement, which will obviate the necessity of furnishing the affidavit of the publisher. The notice of publication will be in form as follows:

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

-----191---

A report marked exhibits A and B having been received in this office on the \_\_\_\_ day of ----- 191\_\_\_\_, from the Commissioner of the General Land Office, in accordance with an act of Congress approved February 26, 1895, entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," as amended in Sundry Civil, June 25, 1910 (Public, 266), showing the classification of lands within the land-grant limits (or the indemnity land-grant limits) of the Northern Pacific Railroad Company, made by the Geological Survey from ----- 191\_\_\_\_, to ----- 191\_\_\_\_, both dates inclusive, as follows:

(Here insert verbatim Exhibit A.)

Notice is hereby given in compliance with the fifth section of said act, that any person, corporation, or company feeling aggrieved by said classification may within sixty days after the date of the first publication hereof, file in this office a duly "verified protest against the acceptance of said classification, which protest shall set forth in concise language the grounds of objection as to the particular (Government subdivision of) land in said protest described," whereupon an order for a hearing shall issue.

That portion of the report of the Geological Survey marked Exhibit B is on file in this office and open to the examination of interested parties.

Notice is further given that by the terms of said act of February 26, 1895, "that as to the lands against the classification whereof no protest shall have been filed . . . the classification when approved by the Secretary of the Interior shall be considered final except in case of fraud."

-----, Register.

-----, Receiver.

6. (a) Hearings on protests filed in pursuance of such published notice shall be conducted in accordance with the Rules of Practice, revised edition of July 15, 1901 [31 L. D., 527], and with paragraph 99 *et seq.* of the general mining circular of March 29, 1909 [37 L. D., 728].

(b) It being contemplated that the classification proceed to a conclusion as soon as practicable, the time for filing appeal from the decision of the register and receiver, upon testimony submitted on said protests, is limited to ten days, and from the decision of the Commissioner of the General Land Office to twenty days, the usual additional time being allowed for service.

(c) It being provided by the sixth section of the act that the unsuccessful party on final decision shall pay all the costs of such hearings, the registers and receivers will require from each litigant a preliminary deposit of a sum of money sufficient to cover the whole costs properly chargeable, of which gross amount any excess over double the costs of the hearing shall be returned to the respective parties immediately upon the conclusion of the said hearing, one half the sum then remaining be refunded to the successful party immediately upon official notice being received at the local land office of the final determination of the controversy, and the net costs be then immediately disposed of in the usual manner; and until such final determination of the matters in issue the amounts so deposited shall remain in the custody of the receiver of public moneys for the land district in which said matter is pending, as "Unearned Fees and other Trust Funds," who shall issue his receipt therefor to the respective parties, all in accordance with circular of May 1, 1909 (37 L. D., 662). With his regular accounts, said receiver shall include a report of all moneys so received.

(d) The lands included in the lists received from this office and incorporated in the published notice are *prima facie* of the character as classified, and the Secretary of the Interior, upon receipt through this office of the report provided for in paragraph 8 (b) will designate, under the proviso to the fifth section of the act, the official to defend such classification at said hearings in the name of the United States, fixing the compensation to be paid for said services.

(e) The orders for the hearings provided for by said act shall issue to the protestant, upon his application, and be by him served upon all parties in interest in the usual manner. Should application for such order be not made within ten days from the filing of said protest, said protest shall be considered as dismissed.

7. The registers and receivers shall in all hearings arising under this act fix as early a date therefor as is practicable, not later than thirty days thereafter, said hearings to be held on consecutive business days, and the record in each case be kept separate from any other.

8. (a) The registers and receivers shall immediately upon the expiration of the time within which protests may be filed, specified in paragraph 5, make a full report, specifying in detail all lands embraced in said published list, "Exhibit A," against which no protests have been filed as provided, and also specifying in detail all lands embraced in said published list, "Exhibit A," against which protests have been filed, to the end that all lands as to which no controversies exist may be speedily and finally classified as to their mineral or non-mineral character.

(b) The register and receiver shall, as soon as possible, make an additional report specifying the protests on which hearings have been

ordered and the dates fixed therefor, and also specifying the protests which are dismissed for want of prosecution.

9. All reports and correspondence shall be addressed to the Commissioner of the General Land Office, and only through him to the Secretary, so that a complete record thereby may be kept in the General Land Office.

10. With the regular monthly returns the various receivers shall transmit all accounts for publication under the fifth section of the act, and accounts under the proviso to the fifth section of the act, which should be filed with them. These accounts must be sworn to before some officer authorized to administer oaths in the land district; the account for publication have attached a copy of the notice published, and all be accompanied with receipts in duplicate signed in blank. These various accounts will then be audited as provided by section 2 of the act of February 26, 1895.

11. Such further instructions under said act will be issued as may hereafter appear necessary, but should unforeseen difficulties present themselves, you will submit the same for special instructions.

The blanks necessary to be used in connection herewith will be furnished.

A copy of said act of February 26, 1895, and of the amendment, June 25, 1910 (Public, 266), is attached.

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved, July 26, 1910:

FRANK PIERCE,  
*Acting Secretary.*

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**CLASSIFICATION OF MINERAL LANDS—ACTS FEBRUARY 26, 1895, AND  
JUNE 25, 1910.**

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., July 26, 1910.*

Plans for cooperation between U. S. Geological Survey and General Land Office in classification of certain mineral lands in the States of Montana and Idaho (reference being made to the letter of the Secretary to Director of the Geological Survey, dated June 27, 1910).

**PURPOSE.**

To enable the Commissioner of the General Land Office to complete the examination and classification of certain mineral lands in the States of Montana and Idaho, under the act of February 26, 1895 (28 Stat., 683-686), as amended, in Sundry Civil, June 25, 1910 (Public, 266).

## DIVISION OF WORK.

The U. S. Geological Survey will undertake the work of examining the lands (which, under said act of February 26, 1895, was performed by commissioners appointed in accordance with the act), and file reports thereof with the Commissioner of the General Land Office.

## PROCEDURE.

1. The U. S. Geological Survey can obtain all plats and information necessary to its work, from the local land offices, the surveyors-general, or from the General Land Office, from time to time as the work progresses, and it will at once proceed to examine and classify the lands as provided in the said act of February 26, 1895, in the following order and manner:

2. The examination will commence with those surveyed tracts, which are *prima facie* nonmineral land, observing, as nearly as practicable, a consecutive order in the examination, to the end that the grants may be adjusted, in this particular, as rapidly as is consistent with accuracy.

3. The examination in the field shall be as to each forty-acre subdivision, and careful note will be made, as evidence, of any testimony offered, or facts observed, relative to each particular tract or to tracts adjacent thereto.

4. All lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws, and in making the classification hereinafter provided for, there shall be taken into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character.

5. From the examination and classification shall be eliminated all tracts for which United States patent has issued, as mineral or agricultural, but note shall be taken of all subdivisions containing patented mining claims, as by the third section of the act of February 26, 1895, the remaining portions of such subdivisions are declared to be *prima facie* mineral and must be classified as such unless the character thus impressed upon the examiners is disproven by testimony or otherwise.

6. Whenever in doubt as to proper classification of any particular tracts of land, the examiner may avail himself of such evidence as may be accessible to him, or summon and take the testimony of such witnesses as he may deem necessary.

7. The examiners should avail themselves of all testimony, formal or informal, likely to aid them in making an accurate classification, as a fair and reasonable classification will render improbable much vexatious and expensive litigation under the fifth and succeeding sections of the act of February 26, 1895.

8. After examination has been made, and all information required has been obtained, classification shall be made and the minutes of the examiner containing the conclusions reached shall state that the lands classified were examined by legal subdivisions (where the lands have been surveyed; and where unsurveyed, by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the examiners may determine) and give the area thereof.

In making this classification certain definite requirements of the act not already noted must be observed:

(1) The word "mineral" as used in the act shall not be held to include coal and iron.

(2) The classification shall be made without reference to any previous examination or report or classification.

9. As the work progresses the Geological Survey will file with the General Land Office separate reports in duplicate for each land district, in form as follows:

EXHIBIT A.

DEPARTMENT OF THE INTERIOR,  
U. S. GEOLOGICAL SURVEY,  
( ——— ——— land district.)

————— 191—.

Report of certain lands within the land-grant limits (or within the indemnity land-grant limits) of the Northern Pacific Railroad Company, within the district above named, examined and classified in accordance with an act of Congress approved February 26, 1895, entitled "An Act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," as amended in Sundry Civil, June 25, 1910 (Public, 266):

Lands Classified as Nonmineral.					Lands Classified as Mineral.				
Subdivision.	Section.	Township.	Range.	Remarks.*	Subdivision.	Section.	Township.	Range.	Remarks.*

\*In case any tract described in the foregoing statement was classified after consideration of testimony offered by witnesses, under the head of remarks should be made a reference by page to those portions of Exhibit B containing the testimony and decisions relative to the particular tract.

## EXHIBIT B.

DEPARTMENT OF THE INTERIOR,

U. S. GEOLOGICAL SURVEY.

(——— land district.)

———, ——, 191—.

The following exhibit is submitted as additional and supplemental to the detailed lists of lands examined and classified by the examiner, shown on Exhibit A, of even date herewith.

Here insert a report concerning the following particulars:

(1) All testimony referred to, and written communications received by the examiner relating to the land embraced in the report, carefully arranged in consecutive order, that reference may readily be made thereto on Exhibit A.

(2) An abstract of the evidence, etc. filed.

(3) A full explanation of the reasons for the specified classification of lands where no testimony or other evidence appears under paragraph 1 of this exhibit.

(4) Any further remarks necessary and not provided for.

(5) A certificate as follows:

It is hereby certified that the foregoing report, exhibits A and B, of the lands examined and classified by the examiner, from ——, 191—, to and including ——, 191—, together with an abstract of the evidence filed, etc., is a true and correct record of the proceedings had during the period specified, both dates included.

(6) The report containing the testimony or other evidence filed under 1 should be marked "Original," for the General Land Office, and the local land office, and the duplicate, marked "Duplicate," prepared for transmittal to the Department should omit the testimony and written communications provided for by subdivision 1 of this section.

10. The examiners shall thereupon proceed to examine and classify all other surveyed lands, in their order, in the same manner as provided by section 4 of the act; and thereafter shall examine and classify in the same manner all unsurveyed lands within said grants, observing the difference that the lands must necessarily be described by natural objects or permanent monuments to identify the same, returning the area of unsurveyed tracts classed as mineral. In this connection it is only necessary to note that the unsurveyed tracts examined under one description be of comparatively small extent, the details relative to the description thereof being left to the discretion of the several examiners.

## COMPLETION OF WORK.

The work of the U. S. Geological Survey is completed as to any particular lands when its report is filed as provided in paragraph nine

hereof. The Commissioner of the General Land Office will complete the classification and submit the same to the department for approval as provided by said acts.

#### FUNDS.

To carry out the purposes, specified above, the General Land Office agrees to contribute twenty-five thousand dollars (\$25,000), or so much thereof as may be required. Under the act appropriating the thirty thousand dollars (\$30,000) the General Land Office will complete the classifications heretofore made but which have not been approved by the Department—there is quite a large area of such lands and in most part publication, or republication must be made—also, the General Land Office must have published all classifications made hereunder by the Geological Survey, and provide funds for the cost of the detail made by the Secretary, as provided in section 5 of the act of February 26, 1895, to represent the United States at the hearings, all of which will come out of this \$30,000 fund. If, however, it should be found that the General Land Office would not need the full \$5,000, a readjustment would be proper.

#### SETTLEMENT OF ACCOUNTS.

All geologic employees upon this work shall be regular appointees of the U. S. Geological Survey. All accounts for salaries, subsistence, traveling and miscellaneous expenses shall be paid in accordance with the regulations of the U. S. Geological Survey, by its disbursing clerk or special disbursing agents. At the end of each month the Director of the U. S. Geological Survey shall render an account to the Commissioner of the General Land Office for such items of salary and expense of the U. S. Geological Survey employees who have performed service on account of this cooperation. This account shall be certified by the Director as being correct and after the approval of the Commissioner of the General Land Office it shall be forwarded to the Auditor for the Interior Department for settlement by transfer. Upon notice of settlement by the Auditor the amount should be charged to the proper appropriation of the General Land Office and credited to the proper appropriation of the U. S. Geological Survey.

Approved, July 21, 1910:

S. V. PROUDFIT,

*Acting Commissioner of the General Land Office.*

Approved, July 21, 1910:

GEO. OTIS SMITH,

*Director, U. S. Geological Survey.*

Approved, July 26, 1910:

FRANK PIERCE,

*Acting Secretary of the Interior.*



[28 Stat., 683.]

An Act To provide for the examination and classification of certain mineral lands in the States of Montana and Idaho.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and is hereby, authorized and directed, as speedily as practicable, to cause all lands within the land districts hereinafter named in the States of Montana and Idaho within the land grant and indemnity land grant limits of the Northern Pacific Railroad Company, as defined by an Act of Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," approved July second, eighteen hundred and sixty-four, and Acts supplemental to and amendatory thereof, to be examined and classified by commissioners to be appointed as hereinafter provided, with special reference to the mineral or non-mineral character of such lands, and to reject, cancel, and disallow any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any lands in said land districts which upon examination shall be classified as provided in this Act as mineral lands.

SEC. 2. That for the purpose of making the examination herein provided for there shall be appointed by the President of the United States, as soon as practicable after the passage of this Act, three commissioners for each of the following land districts, to-wit: The Bozeman, Helena, and Missoula land districts, in the State of Montana, and the Coeur d'Alene land district, in the State of Idaho, at least one of whom for each district shall be a practical miner and a resident of such district; and said persons so appointed for each district shall constitute a board of commissioners to perform within such district the duties herein prescribed. They shall each receive for their compensation ten dollars for each day they may be actually engaged in the performance of their duties, which shall include their transportation and subsistence expenses, but the total amount of compensation to be paid to each commissioner annually shall in no case exceed the sum of twenty-five hundred dollars; and their accounts shall be audited by the Secretary of the Interior and paid monthly. Before entering upon their duties each of said commissioners shall take an oath to faithfully perform the duties of his office. Said commissioners shall make examination of the lands herein mentioned within their respective districts, and may also take the testimony of witnesses as to the mineral or nonmineral character of any of said lands, and receive any other evidence relating to said matter, and shall have power to summon witnesses to appear before them, and to administer oaths; and they shall, immediately upon their appointment, proceed to examine and classify the lands herein mentioned within their respective districts, as provided in this Act, and shall fully complete said classification within the term of four years from the date of this Act. The oath of office of said commissioners shall be filed by them in the office of the Commissioner of the General Land Office. All testimony taken by said commissioners shall be reduced to writing, subscribed by the witnesses, and filed with the report of the commissioners hereinafter required. The action or decision of a majority of said commissioners in each district shall control in all matters herein provided for. That the commissioners shall perform the work of examination and classification herein directed according to such rules and regulations as the Secretary of the Interior shall prescribe.

SEC. 3. That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase

under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character. The classification herein provided for shall be by each legal subdivision where the lands have been surveyed. If the lands examined are not surveyed, classification shall be made by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the commissioners may determine. Where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the forty-acre subdivision within which it is located is mineral land: *Provided*, That the word "mineral," where it occurs in this Act, shall not be held to include iron or coal: *And provided further*, That the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification thereof.

SEC. 4. That such of the lands herein mentioned as have been surveyed prior to the passage of this Act shall be first examined and classified as herein provided, and afterwards, and as speedily as practicable, the lands herein mentioned which have not been surveyed, until all the lands herein mentioned shall have been examined and classified, as herein provided.

SEC. 5. That said commissioners shall, on or before the fifth day of each month, file in the office of the register and receiver of the land office of the land district in which the land examined and classified is situated a full report, in duplicate, in such form as the Secretary of the Interior may prescribe, showing all lands examined by them during the preceding month, and specifying clearly, by legal subdivisions, where the land is surveyed, or otherwise by natural objects or permanent monuments to identify the same, the lands classified by them as mineral lands and those classified as nonmineral; and with said report shall be filed all testimony taken and written communications received by said commissioners relating to the lands embraced in the report. The register and receiver shall file one duplicate of said report in their office, together with all accompanying testimony and papers, and the other duplicate shall be by them forwarded direct to the Secretary of the Interior, and said commissioners shall furnish to the Secretary of the Interior at any time such further or additional report or information as he may require concerning any matter relating to their duties or the performance of the same. Upon receipt of such report the register of the land office shall, at the expense of the United States, cause to be published in a newspaper of general circulation in the county in which the land is located, and in one newspaper published at the capital city of the State in which the lands may be situated, at least once a week for four consecutive weeks, notice of the classification of lands as shown by said report, and any person, corporation, or company feeling aggrieved by such classification may, at any time within sixty days after the first publication of said notice, file with the register and receiver of the land office a verified protest against the acceptance of said classification, which protest shall set forth in concise language the grounds of objection to the classification as to the particular land in said protest described, whereupon a hearing shall be ordered by, and conducted before, the said register and receiver, under rules and regulations as near as practicable in conformity with the rules and practice of such land office in contests involving the mineral or nonmineral character of land in other cases; and an appeal from the decision of the

register and receiver shall be allowed to the Commissioner of the General Land Office and the Secretary of the Interior, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at such hearings the United States shall be represented and defended by the United States district attorney or his assistants for the judicial district in which the land is situated, unless the Secretary of the Interior shall detail some proper officer of the Department of the Interior for that purpose. The compensation for such service shall not exceed ten dollars per day for each day's actual service before the register and receiver, to be paid out of the fund provided for the examination and classification of said mineral lands.

SEC. 6. That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification. All lands so classified as above without protest, and the classification whereof is disapproved by the Secretary of the Interior, and all lands whereof the classification has been invalidated for fraud, shall be subject to hearing and determination in such manner as the Secretary of the Interior may prescribe. And as to all such lands, and as to the lands against the classification whereof protests may be filed, the final ruling made after the day set for hearing shall determine the proper classification; and all records of the local and general land offices shall be made to conform to the classification as determined by such final ruling, and all costs of such hearings shall be paid by the unsuccessful party, under such rules as the Secretary of the Interior may prescribe; and the Secretary of the Interior is hereby authorized to establish such rules and regulations as may be necessary to carry into effect the true intent and provisions of this Act as speedily as practicable.

SEC. 7. That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said land districts until such land shall have been examined and classified as nonmineral, as provided for in this Act, and such patent or other evidence of title shall only issue then to such land, if any, in said land districts as said company may be by law and compliance therewith and by the said classification, entitled to, and any patent, certificate, or record of selection, or other evidence of title or right to possession of any land in said land districts, issued, entered, or delivered to said Northern Pacific Railroad Company in violation of the provisions of this Act shall be void: *Provided*, That nothing contained in this Act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in any wise affecting any right on the part of the United States against the said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company.

SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of twenty thousand dollars, or so much thereof as may be necessary, to be expended to carry into effect the provisions of this Act, the same to be paid out upon the order of the Secretary of the Interior; and the Secretary of the Interior is hereby required to embrace in the annual estimates submitted to Congress for appropriations for the Interior Department a sufficient sum to pay the said commissioners for the fiscal year next ensuing, and annually thereafter until the classification of lands required by this Act has been fully accomplished.

Approved, February 26, 1895.

## [PUBLIC—No. 266.]

An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and eleven, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums be, and the same are hereby, appropriated, for the objects hereinafter expressed, for the fiscal year ending June thirtieth, nineteen hundred and eleven, namely:

\* \* \* not exceeding thirty thousand dollars to enable the Commissioner of the General Land Office to complete the examination and classification of lands within the limits of the Northern Pacific grant under the Act of July second, eighteen hundred and sixty-four, as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five, such examination and classification when approved by the Secretary of the Interior to have the same force and effect as a classification by the mineral land commissioners provided for in said Act of February twenty-sixth, eighteen hundred and ninety-five. \* \* \*

Approved, June 25, 1910.

## CAMP BOWIE ABANDONED MILITARY RESERVATION—SALE OF LANDS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 19, 1910,*

REGISTER AND RECEIVER,  
*Phoenix, Arizona.*

SIRS: 1. The Camp Bowie military reservation was established by Executive Order of March 30, 1870, enlarged November 27, 1877, and was relinquished November 5, 1894, without improvements, except as stated below. The area of the reservation is 23,233.18 acres, including 1,294.32 acres in Secs. 16 and 36, school sections.

2. The lands have been appraised in accordance with the provisions of the act of July 5, 1884 (23 Stat., 103), and the appraised list shows the following classification and valuation, viz:

Class.	Price per acre.	Acreage.	Total appraised price.
Grazing.....	\$1.25	8,215.73	\$10,269.75
Do.....	2.50	2,120.23	5,300.63
Agricultural.....	1.75	40.00	70.00
Do.....	2.00	40.00	80.00
Mineral, lode.....	5.00	2,320.00	11,600.00
Mineral, limestone and marble.....	2.50	9,202.90	23,007.33
Limekiln.....			200.00
Total.....		21,938.86	50,527.71

The school sections were not appraised.

3. The reservation was turned over to this department subsequent to the passage of the act of August 23, 1894 (28 Stat., 491), and the lands are not subject to settlement and entry under said act, but will be disposed of in accordance with the provisions of said act of July 5, 1884.

4. Under the latter act, the lands classified as agricultural and grazing will be offered at public auction for cash at not less than the appraised price, by smallest legal subdivision, in the order in which they appear on the appraised list, a copy of which is submitted separately. There are to be sold 258 tracts, embracing 10,415.96 acres. The appraisers report that there is a limekiln belonging to the United States on the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 12, T. 15 S., R. 28 E., which they have appraised at \$200. The purchaser of this tract will be required to pay for the limekiln in addition to the appraised price of the land.

5. You will sell the land by the acre at not less than the appraised price, and will require each subsequent bidder to increase the preceding bid by 25 cents per acre; though you may, should you deem it advisable, reduce this limit to 10 cents per acre, for a portion or all of the sale, the intention being to get full value of the land and to complete the offering as speedily as practicable.

6. The sale will take place on the reservation, and will commence at 9 o'clock a. m., October 10, 1910, and continue from day to day until completed. You will use due expedition in the conduct of said sale.

7. Payment will be required as follows: For each tract sold at \$1.25 per acre and less than \$1.75, \$10 must be paid to the Receiver as soon as practicable on the day the tract is sold; for each tract sold at \$1.75 or more per acre, \$20 must be paid to the Receiver as soon as practicable on the day it is sold, and should the purchaser fail to pay the balance of the money due on his purchase to the Receiver before October 20, 1910, he will forfeit the amount deposited by him. The Receiver will issue the usual receipts upon payment of the required amounts, specifying thereon that it is for public sale, Camp Bowie abandoned military reservation. Upon full payment being made the Register will issue cash certificate, specifying thereon, "Public sale, Camp Bowie abandoned military reservation." Should a bidder who has been awarded a tract, fail to make a deposit, you will no longer recognize him as a bidder at the sale.

8. The purchaser will be required to furnish evidence of his citizenship; if native-born, his affidavit to that effect, and if naturalized, record evidence thereof. Inasmuch, however, as the appraisers have classified the lands into mineral and agricultural, a non-mineral affidavit will not be required.

9. The appraisers report that there are two settlers on the lands to be sold, both of whom have valuable improvements thereon. They

both went on the land subsequent to the year 1884, and their settlement was not protected by the act of July 5, 1884, but they were trespassers on the lands. This will not prevent them from bidding at the sale, but it should be distinctly understood and announced at the sale that it does not give them a superior right to bid for the land.

10. In this connection, you will each day call the special attention of prospective bidders and read to them the following section of the Revised Statutes, viz:

SEC. 2373. Every person who, before or at the time of the public sale of any of the land of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree with any person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders, or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years or both.

You will keep close watch of the sale, and should you observe any attempt to hinder or prevent any person from bidding, you will at once call attention to the law quoted, and inform bidders that purchasers who are guilty of fraud against the United States are liable to have their entries canceled and the money forfeited, as well as to suffer the penalties provided in said law. You will proceed with the sale, if deemed advisable by you, and make full report in the premises.

11. Under section 5 of said act of July 5, 1884, lands in abandoned military reservations containing mineral deposits are to be disposed of exclusively under the mineral land laws of the United States. Therefore, you will not offer at public sale the lands classified as "mineral, lode," "mineral, limestone," and "mineral, lime, marble," but the same will be disposed of under the laws applicable thereto.

12. The lands remaining unsold after the offering closes, will not be subject to private entry, until after another offering, as provided in the act of July 5, 1884, above cited. You will retain the copy of the appraised list, however, for information relative to the mineral lands.

13. The Receiver will furnish with his accounts a separate "Abstract of Collections on Public Sales (Camp Bowie abandoned military reservation)," depositing all money received in connection with the sale direct to the credit of the Treasurer of the United States, and will not carry same in his "unearned" account.

14. Your necessary traveling expenses, including sleeper and transportation to and from the reservation, will upon submission of proper vouchers to this office, be paid from the appropriation for the survey, appraisal and sale of abandoned military reservations, 1911.

15. You are authorized to designate Roscoe F. Washburn as clerk in charge of your office during your absence on this duty. This designation of Clerk Washburn to act in your place is at your own risk. He will note on all applications and papers received during your absence the hour and date of their receipt, assigning current serial numbers thereto, and will issue receipts for all moneys received by him, the receiver having previously signed enough blanks for the purpose. Upon your return to your regular duties, you will take up these matters and act upon them as expeditiously as practicable.

16. Notice of the offering, with authority for the publication thereof, has been sent to the Arizona Republican and Arizona Gazette, published at Phoenix, Arizona; the Epitaph, published at Tombstone, Arizona; and the Arizona Range News, published at Willcox, Arizona. You will post a copy of said notice in your office.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved, July 19, 1910:

FRANK PIERCE,

*Acting Secretary.*

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**DESERT LAND ENTRY—ANNUAL PROOF—EXPENDITURES FOR CONSTRUCTION AND MAINTENANCE CHARGES.**

**MUNSON v. JOHNSON.**

While annual proof submitted upon a desert land entry, showing expenditures for construction and maintenance charges on irrigation works by means of which the land is proposed to be irrigated, can not, in a contest proceeding against the entry on the ground of failure to make the required expenditures, be considered as substantive proof of such claimed expenditures, it is nevertheless notice to the world of the amount and character of the expenditure claimed, and it is incumbent on the contestant to challenge and disprove such claimed expenditure.

Payment by a desert land entryman to cover his proportionate share of the cost of construction and maintenance of irrigation works by means of which his land is proposed to be irrigated is a proper basis for annual proof.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 26, 1910.* (O. W. L.)

T. E. Munson has appealed from your office decision of January 31, 1910, affirming the action of the register and receiver in dismissing his contest against desert land entry 217, made December 8, 1906, by Herbert E. Johnson at Sterling, Colorado, for the E.  $\frac{1}{2}$  of Sec. 20, T. 11 N., R. 49 W.

The contest affidavit, filed December 31, 1908, charged that—

Herbert E. Johnson has wholly failed to place or expend one dollar per acre in necessary improvements upon said land during the second year after entry

and has wholly failed to make proof of the placing of any improvements upon said land during the second year after entry and all of said conditions exist at the present time.

At the hearing, June 10, 1909, the contestee moved to dismiss, upon the ground that the contest affidavit was insufficient. This motion was sustained by the register, with leave to amend. The contestant thereupon amended as follows:

The charge to make necessary improvements shall read as follows: "Also, that the said Herbert E. Johnson has wholly failed to place or expend one dollar per acre in necessary improvement, irrigation or reclamation of said land during the second year after entry, and has wholly failed to make proof of the placing of any improvements or making any expenditure upon said land during the second year after entry, and all of said conditions exist at the present time."

The second annual proof, made December 7, 1908, before a deputy clerk of the district court of Denver County, Colorado, alleged the expenditure of \$320 "on contract for water rights with the North Sterling Irrigation District, as per receipt attached," the receipt reading:

\$320.00

STERLING, COLORADO, Dec. 5th, 1908.

Received of Herbert E. Johnson the sum of Three Hundred Twenty & no/100 Dollars, to apply on assessments as per his contract with

THE NORTH STERLING IRRIGATION DISTRICT.

Said sum to be applied, *first*, to the payment of all assessments heretofore levied by said district, and *second*, the balance, if any, to the payment of assessments hereafter levied during the life of said contract, on his D. L. Entry for east half, Sec. 20, Twp. 11 N., R. 49 W.

THE NORTH STERLING IRRIGATION DISTRICT,

[SEAL.]

By W. B. GIACOMINI, *Secretary*.

By S. E. NAUGLE.

No copy of the contract with the Irrigation District accompanies the record.

Your office appears to have raised no objection to the sufficiency of the annual proof, although it was taken in violation of the circular of March 1, 1907 (35 L. D., 436), prohibiting the reception of proofs taken before deputy clerks of courts.

The contestant introduced the testimony of himself and one witness. He testified that there were no improvements placed upon the land during the second year of the entry; that he examined the records of the land office, and failed to find that the claimant had made second annual proof, but admits that he learned, the day before the hearing, that such proof had been made; that there was no way by which the claimant could make an expenditure to secure water for this land, but admits that a reservoir and ditch under course of construction by the Irrigation District would cover the



land. The other witness corroborated the contestant's testimony, that no improvements had been placed *upon the land* during the second year.

The contestant rested after this testimony, whereupon the contestee moved to dismiss, which was sustained by the register.

The contentions of the appellant are substantially as follows:

(1) That having proven that there were no improvements placed *upon the land* embraced in the entry during its second year, he had made out a *prima facie* case, and that the burden of proof was thereby shifted, it being a matter for the defense to prove the necessary expenditure in other ways.

(2) That the annual proof was not part of the record, and should not have been considered.

(3) That even considering it, it fails to show any expenditure for a water right, and, further, that an irrigation district, under the laws of Colorado, is prohibited from making any contract for a perpetual water right with any person who is not the owner of the land but is a mere claimant of government land.

Section 5 of the act of March 3, 1891 (26 Stat., 1095), requires the annual expenditure of one dollar per acre in the necessary irrigation, reclamation and cultivation of the land by means of main canals and branch ditches, in permanent improvements upon the land, and in the purchase of water rights for its irrigation. An expenditure for any one of the above purposes is therefore sufficient as a basis for annual proof.

Appellant, under the first contention, urges that to require him to prove that claimant had not expended the sum of \$320 in the purchase of water rights would compel him to prove a negative proposition peculiarly within the knowledge of the contestee. It may be conceded that if no annual proof upon a desert entry has been made, evidence that there were no improvements upon the land might be sufficient to put a contestee upon his defense. When, however, as in the present case, an annual proof has been offered, disclosing the exact nature of the expenditure claimed, it is incumbent on the contestant to challenge and disprove such expenditure. The annual proof could, of course, not be considered as substantive proof in the contest proceedings of the facts contained therein; nevertheless, it is notice to the world of the amount and character of the expenditures claimed.

The third contention involves the constitution and operation of irrigation districts, as governed by sections 3440 to 3494, inclusive, Revised Statutes of Colorado, 1908. In brief, it is formed by the owners of land within its boundaries; it is officered by a board of three directors; has the power to construct or acquire ditches, canals

and reservoirs; to issue bonds for those purposes, and to levy assessments to meet operation and maintenance charges, expenses of construction, etc. The district may also lease or rent the use of water, or contract for its delivery to occupants of other lands within or without the district, subject to certain conditions as to price, but it is provided that "no vested or prescriptive right to the use of such water shall attach to such land by virtue of such lease or such rental." The appellee contends that this provision does not prohibit an irrigation district from making a *contract* for a perpetual water right to land not within the district, as distinguished from a *rental* or *lease*. The act of April 13, 1909 (Session Laws of Colorado, 1909, 422), further permits the board of directors, upon the above conditions, to lease or rent the use of water, or contract for its delivery, to settlers upon the public domain, and also empowers them to contract with such settlers to the effect that the settler shall, upon receiving full title to his lands, and upon payment of his proportionate share of the bond assessment, include his land within the district, and upon such inclusion be entitled to all the rights and privileges of a member thereof.

While the annual proof speaks of the expenditure as being "on contract for water rights," the receipt shows it to be for assessments theretofore levied, the balance to be applied upon later levied assessments. The testimony shows that the Irrigation District is engaged in the construction of irrigation works from which the contestee's land can be irrigated. Can it be doubted that payments of his proportionate share of the cost of the construction and maintenance of such works by a desert land entryman is a proper basis for annual proof? Under section 4 of the act of March 3, 1891, "persons entering or proposing to enter separate sections or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming said tracts." The irrigation district constructs and operates the reservoirs and canals whereby the individual's land is irrigated, and recovers the expenditure by assessment upon each individual land holder. The payment of such assessments, in the opinion of the Department, is a proper basis for annual proof. It is therefore unnecessary to pass upon the question as to whether the irrigation district is empowered, under the laws of Colorado, to contract for a perpetual water right with a claimant to Government land, but in this connection, see also section 27 of regulations of November 30, 1908 (37 L. D., 312-320).

Your decision is accordingly affirmed.

**HOMESTEAD ENTRY—DISQUALIFICATION—OWNERSHIP OF LAND—  
EXCESS OF LESS THAN ONE ACRE.**

**AMIDON v. HEGDALE.**

Under the maxim *de minimis non curat lex*, the ownership of less than one acre in excess of 160 acres, will not be held a disqualification to make homestead entry.

*First Assistant Secretary Pierce to the Commissioner of the General  
(F. W. C.) Land Office, July 28, 1910. (J. H. T.)*

Ossian Amidon has filed motion for review of departmental decision of May 14, 1910, dismissing his contest against homestead of Andrew J. Hegdale, for S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 26, and E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 35, T. 25 N., R. 13 W., W. M., Seattle, Washington, land district.

Hegdale made said entry July 14, 1905, and the contest affidavit against same was filed August 9, 1906, by Amidon, charging failure to establish and maintain residence or to improve the entry as required by law, and that at the time of the entry Hegdale was proprietor of more than 160 acres of land, and was therefore disqualified to make homestead entry. October 5, 1909, hearing was had upon the charges; the local office held the entry for cancellation, which action you affirmed January 14, 1910. The only question on which evidence was submitted was as to Hegdale's disqualification. At the time of making entry he was owner of a town lot 50x130 feet approximately. He had prior thereto made an entry under the timber and stone act for the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 4, T. 15 N., R. 5 W., W. M., which was patented November 28, 1900, which land he did not convey by any deed of record until October 21, 1907. Evidence was introduced upon the part of the contestant with a view of showing that Hegdale still owned the land embraced in his said timber entry at the time he made the homestead entry. He paid taxes assessed to him as owner of the land from February 18, 1901, to April 23, 1907.

The whole controversy has turned upon the question of disqualification of Hegdale by reason of excess holdings above 160 acres under section 2289, U. S. R. S., as amended. Hegdale attempted to show that the land under his timber entry was in fact less than 160 acres, and that prior to his entry he made a contract for sale of same to one Anderson, who made a partial payment to him, after which by mutual agreement the contract was rescinded and destroyed and Hegdale repaid to Anderson his initial payment. The Department reversed your office and the local office and found the contract of sale had been made in good faith and that Hegdale was not disqualified at the time of his entry. The motion raises only the question of the correctness of that conclusion. It, however, as any motion for review or new trial, goes to the sufficiency of the entire record.

Your office stated that the plat of survey of the land embraced in Hegdale's timber entry shows that said entry contained 160.11 acres. Upon examination it is found that said plat shows the S.  $\frac{1}{2}$  N.  $\frac{1}{2}$  and the S.  $\frac{1}{2}$  of the section to be regular portions of the section, whose quarter-quarter subdivisions would be regular 40-acre tracts. All of the excess or irregularity purports to be in the north tier of tracts, according to the usual practice, none of which is embraced in the entry. The entry was made and patented as containing 160 acres, and this is the ordinary reading of the plat. It is assumed that your statement as to the error was based upon informal computation from the figures shown on the plat or from the field notes. Hegdale would have been justified in resting in the belief that said entry contained only 160 acres. In fact, no point was made of this by the contestant, and no adjudication or contention was made by him concerning any such excess, and Hegdale at the hearing attempted to offer evidence with a view to showing that the entry actually contained less than 160 acres, but the local officers ruled that he could not be allowed to do so. It is not believed that the land department, especially of its own motion, should consider this infinitesimal and doubtful objection to the entry under the circumstances here shown.

There is no dispute as to the ownership by Hegdale of a town lot approximately 50x130 feet. He disputes the allegation of ownership as to the land embraced in his timber entry at the time he made homestead entry. Even if Hegdale did not, prior to his application to make the present entry, enter into a *bona fide* contract of sale of his timber entry, his holdings in excess of 160 acres were a mere trifle, about which the law does not concern itself. That ancient maxim of law, *de minimis non curat lex*, seems to apply here. Either the stated excess of eleven-hundredths acres in the tract of agricultural land; or the town lot, or both of them, altogether only a small fraction of an acre, may be considered within this rule. This view is in harmony with the well established rule concerning the payment of the fee required in homestead entries. Section 2290, R. S., requires payment of a fee of \$5 when the entry is of not more than 80 acres, and payment of \$10 when the entry is for more than 80 acres. It has long since been well established that the \$10 fee should be paid when the entry is for 81 acres or more, and the \$5 fee when the entry embraces less than 81 acres, even though it be more than 80 acres.

In Copp's Land Owner, Vol. 8, p. 157, the question of fees under the above section is quite fully discussed. Therein the Acting Secretary of the Department stated:

I am of the opinion, however, that the rule does not require notice to be taken of an immaterial fractional excess not amounting to one acre. The words "of not more than 80 acres," used in the law, clearly indicate a numerical signification as though reading "of not more than 80." Besides I am advised that in

cash entries you do not burden the records with correspondence and adjustments respecting such fractional excess where they do not amount to an acre of land, and good practice would seem to require harmony in this regard in relation to the matter in question. The excess in the case submitted being but .47 of an acre, the fee of \$5 additional should not be required.

See also the case of James L. Moon (13 L. D., 614).

The Department therefore holds that it is not shown that Hegdale was disqualified for making the entry under contest. No reason is seen for disturbing the action heretofore taken. The motion for review is denied.

**SOLDIERS' ADDITIONAL CERTIFICATE—PARTIAL LOCATION OF RIGHT—  
EVIDENCE OF REMAINING PORTION.**

**SLEDGE, FISHING AND MINING COMPANY.**

Upon the location of any portion of a certificate of soldiers' additional right, notation to that effect should be promptly made upon the original certificate, and certificates thus located in part should not be thereafter returned to those entitled to the unused portion, but the owners, if they so desire, may secure, in accordance with law, certified copies of such certificates with the memoranda entered thereon, and in this manner obtain evidence of the outstanding portion of the rights involved.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 28, 1910.* (S. W. W.)

It appears from the record in this case that the Sledge, Fishing and Mining Company, as the assignee of James M. Marcum, was the owner of a soldiers' additional certified right to make entry for 120 acres of public lands and that on application therefor final certificate and receipt were issued to the company July 24, 1909, for 15.295 acres of land embraced in surveys numbered 251 and 252, Juneau, Alaska, land district, leaving the certificate unused as to 104.705 acres, for which unused portion the company desires to make entry of other lands included in approved surveys.

By your office decision of May 12, 1910, you declined a request on behalf of the company that the local officers at Juneau be promptly notified of the company's right to make entry for 104.705 acres, as assignee of Marcum, and in disposing of the case it was stated in your letter that it was formerly the practice when a certificate of right was located in part to indicate the quantity satisfied by memoranda on the face of the certificate, whereupon the original certificate thus noted was returned to the applicant for further use; that such memoranda were equivalent to a recertification of the right as to the unused portion, and in view of circular of April 1, 1910 (38 L. D., 517), which discontinued the practice of recertification, your office

held that the practice of noting the quantity of a certificate satisfied and returning the certificate to the applicant was no longer permissible.

It is urged in the appeal that the action requested is not equivalent to a recertification of the right as to the unused portion thereof, as the company desires only that proper instructions may be given the local officers which would insure the right of the company to perfect its entry for the unused portion of the certificate which is now on file in your office. The reason assigned for making this request is that the local officers at Juneau have expressed doubt as to their right to issue a final certificate on a location where the certificate of right is not on file in their office, and that as the distance from Juneau to Washington is so great and the time for making entry in Alaska so limited, probably a year would elapse before final action could be taken if the local officers are required to forward the application to the General Land Office for instructions.

It is stated in connection with this appeal that the company originally applied to locate this right upon surveys Nos. 251, 252, 254, 255, 256, and 432, aggregating 80.419 acres, and that for irregularities in the surveys or for failure to properly post notice as required by the regulations, final action could not be taken upon any of the surveys except Nos. 251 and 252, and that, therefore, the company being desirous of securing title to lands properly surveyed and entered secured the issue of final certificate on surveys Nos. 251 and 252, and that the local office in forwarding the papers forwarded the application for all of the surveys and the entire certified right at the same time.

This statement is confirmed in part by the original application, serial 047, which shows that the surveys Nos. 254, 255, 256, and 432 were originally included therein and have been erased by lines drawn therethrough. The Department is not advised as to the areas embraced in these surveys which have been eliminated from the application or as to whether such surveys have been finally approved.

The matter considered, however, it would seem that the question of the recertification of a soldiers' additional right does not arise in this case. The company apparently merely desires that the local officers at Juneau be informed that the original right of James M. Marcum, of which the company appears to be the owner by assignment, was valid to the extent of 120 acres, and that the certificate representing that right was forwarded to your office at the time of the issue of the final certificate on surveys Nos. 251 and 252. Such being the case, there would seem to be no good reason why your office should not inform the register and receiver that they are authorized to take final action on the remaining surveys originally embraced in

the application, in like manner as if the certificate were in their possession, and that they need not first submit the case to your office for consideration.

This ruling is in no sense an adjudication of the validity of the right to the extent of the surveys involved nor is it to be construed as determinative of any questions that may subsequently arise in perfecting the location, but is merely intended to avoid the delay necessary to a return of the certificate to the register and receiver. The action of your office is modified accordingly and the papers are returned herewith.

In this connection it is deemed proper to invite the attention of your office to the fact that upon the location of any portion of a certificate of right notation to that effect should promptly be made upon the original certificate, and that certificates thus located in part should not thereafter be returned to those owning the unused portion but the owners, if they so desire, may secure, in accordance with law, certified copies of such certificate with the memoranda entered thereon, and in this manner obtain evidence of the outstanding portion of the rights involved.

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**SMALL HOLDING SETTLERS—RAILROAD GRANT—ACT OF APRIL 28, 1904.**

**SANTA FE PACIFIC R. R. Co.**

Lands valuable for coal, relinquished by the Santa Fe Pacific R. R. Co. in favor of small holding settlers, under the act of April 28, 1904, may be patented to such settlers, if qualified under the act, notwithstanding their coal character.

The Santa Fe Pacific R. R. Co., upon relinquishing under the provisions of the act of April 28, 1904, lands valuable for coal, is entitled to select in lieu thereof coal lands equal in value to those relinquished.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, July 29, 1910.* (S. W. W.)

The Department has received your office letter of July 25, 1910, submitting for consideration certain questions arising under the act of April 28, 1904 (33 Stat., 556), for the relief of small holding settlers within the limits of the grant to the Atlantic and Pacific Railroad Company in the Territory of New Mexico, which act reads as follows:

That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to

which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

SEC. 2. That the Secretary of the Interior shall, as soon as may be after the passage of this act, cause inquiry to be made of all lands so held by settlers, and shall cause the holdings of such settlers to be surveyed, without cost to the settlers, cause patents to issue to each such settler for his or her such holdings: *Provided*, That not to exceed one hundred and sixty acres shall be patented to any one person, and such recipient must possess the qualifications necessary to entitle him or her to enter such land under the homestead laws.

SEC. 3. That any fractions of any such sections of land remaining after the issuance of patents to the settlers as aforesaid shall be subject to entry by citizens the same as other public lands of the United States.

The small holding settlers referred to in the title of the act are those for whom provision was made by sections sixteen and seventeen of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), and inasmuch as it was found that certain of these small holding claims were located upon lands which passed to the Atlantic and Pacific Railroad Company, now the Santa Fe Pacific Railroad Company, under the grant of July 27, 1866 (14 Stat., 292), the act of April 28, 1904, *supra*, was passed for the purpose of affording a means whereby relief might be granted these settlers. The grant to the railroad company did not except lands valuable for coal and it having been found that some of the lands which have been patented to the company are claimed by the settlers under the act of 1904, and are valuable for coal, the company wishes to be assured before relinquishing the lands claimed by the settlers that it will be allowed to select coal land of equal quality in lieu thereof.

It is stated in your office letter that the proposed deed submitted by the company has been examined and found to be satisfactory except that it includes a tract in Sec. 17, T. 13 N., R. 17 W., upon which no small holding claim is located, and because of which said tract may not be relinquished by the company and must, in any event, be eliminated from the deed; and while your office expresses the opinion that the lands are clearly within the terms of the law the question is suggested that there may be grave objection to any conclusion which would authorize the disposal of lands valuable for their coal deposits in the manner indicated.

It will be seen by referring to the act of 1904, quoted above, that no mention is made of mineral lands nor are the settlers confined in



terms to nonmineral lands. The act clearly authorizes the Atlantic and Pacific Railroad Company, or its successors in interest, to relinquish any land acquired under its grant, upon which the Secretary of the Interior is authorized to issue a patent to such settler for the land held by him, there being but one proviso, namely, that not to exceed one hundred and sixty acres shall be patented to any one person, who must possess the qualifications necessary to entitle him to enter such land under the homestead laws.

By the terms of the treaty of Guadalupe Hidalgo, concluded February 2, 1848 (9 Stat., 922), the United States agreed to protect the titles of individuals derived from former sovereigns owning the territory, and provision was made for confirmation of such claims by the act of July 22, 1854 (10 Stat., 308). A number of claims filed with the surveyor-general as provided for by the act of 1854, some embracing very large areas and others consisting only of small claims, were confirmed by Congress from time to time until March 3, 1891, when Congress, by act of that date, created a Court of Private Land Claims for the adjudication of all such claims in the territory acquired from Mexico.

By the sixteenth and seventeenth sections of the act of 1891, Congress afforded the holders of small tracts, not exceeding 160 acres, and who had occupied the same for the period specified in the act, an inexpensive and easy method of acquiring title thereto without the necessity of resorting to the Court of Private Land Claims for confirmation. These claimants had merely to file their claims with the surveyor-general of the Territory and to make proof of their citizenship, by virtue of the treaty with Mexico, and their occupation of the land for the period named in the act. The act contained no provision whatever restricting such claims to nonmineral lands, whereas in that portion of the act relating to claims submitted for confirmation by the court, it was provided that no allowance or confirmation of any claim should confer any right or title to any gold, silver or quicksilver mines or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals, or unless the grantee had otherwise become entitled thereto in law and in equity.

While it is true that no express exception of mineral lands is necessary to exclude them from an ordinary grant, nevertheless, where Congress undertakes to except certain minerals, the presumption is that all other minerals not named are not excepted, and it is but reasonable to assume that Congress intended to impose no greater restrictions upon the small holding claimant provided for by sections sixteen and seventeen of the act than were imposed upon the owners of larger claims who were required to procure confirmation through the court.

Having under consideration the purpose of sections sixteen and seventeen of the act of 1891, this Department has said:

The history of the act of 1891 and the terms of the act itself, which was the successful culmination of frequent attempts since the act of 1854 at legislation looking to the final settlement of private land claims in the territory derived from the Republic of Mexico, show that the homes and lands of small holding claimants . . . were the objects of the special solicitude of Congress, and that it was the intention by the passage of the latter act to afford them full protection, and provide a simple and easy means by which they could secure and perfect their titles against all possibility of successful claim under the public land laws of the United States as well as against danger to them by reason of failure of confirmation of the alleged Spanish or Mexican grants within which their claims were situated. It is believed that the laws and decisions applicable to the facts in this case should be liberally construed and applied in behalf of these small holding claimants. [*Apodaca et al. v. Mulligan*, 27 L. D., 604, 608.]

As stated in your office letter, Congress knew that the railroad company acquired the title to coal land under its grant, and as the act of 1904 clearly provided that the company may relinquish any section of land acquired under the grant which is occupied by a small holding settler, to the end that the home of the latter may be protected, there would seem to be no reason why the land so relinquished by the company may not be patented to the settler if he can show himself qualified under the terms of the act. Such being the case, and as the acts expressly provide that the company relinquishing the land may select in lieu thereof "vacant public land of equal quality in said territory," the company, upon relinquishing lands found to be valuable for coal, would appear to be entitled to select in lieu thereof coal lands equal in value to those relinquished.

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**FORT DAVIS ABANDONED MILITARY RESERVATION—SALE OF LANDS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 31, 1910.*

THE HONORABLE SECRETARY OF THE INTERIOR.

SIR: 1. The Fort Davis military reservation, situated in Jeff Davis County, Texas, was turned over to this Department by Executive order of December 17, 1906, for disposal under the act of Congress approved July 5, 1884 (23 Stat., 103), or as may be otherwise provided by law. The lands have been subdivided into thirty lots, the total acreage to be sold being 290.09. The lands have been

appraised in accordance with said act at prices ranging from \$70 to \$150 per tract, the total appraised value being \$2,970. The lands are not within any land district, and I have to recommend that the sale be under the following rules and regulations, viz:

2. The lands will be sold at public auction under said act of July 5, 1884, by James W. Witten, Superintendent of the Opening and Sale of Indian Lands, at not less than the appraised value, the sale to take place on or near the reservation on November 21, 1910, commencing at 10 o'clock a. m., each tract to be sold separately.

3. Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the tracts are offered for sale, and any person may purchase any number of lots for which he is the highest bidder.

4. Payment must be made to Mr. Witten either in post-office money order, certified check drawn on a national bank, or New York draft drawn by a national bank. The money orders, checks, and drafts should be made payable to Fred Dennett, Commissioner of the General Land Office, Washington, D. C. No cash will be received at the sale.

5. The superintendent of the sale shall note on the appraised list opposite each tract sold, in appropriately headed columns, the name of the purchaser and the purchase price, and will forward the same, together with the plat of the reservation, and checks, etc., to the Commissioner of the General Land Office.

6. The superintendent of the sale will be authorized to reject any and all bids and to adjourn the sale to any other time or place which in his judgment may seem best, and he may prescribe rules for the conduct of the sale which are not in conflict with these regulations.

7. Blanks authorizing the publication of notice of the sale in the *Avalanche*, published at Alpine, Texas, the *Herald*, published at El Paso, Texas, the *Morning News*, published at Dallas, Texas, and the *Record*, published at Fort Worth, Texas, are inclosed herewith, and it is recommended that you sign them.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved, August 1, 1910:

FRANK PIERCE,  
*Acting Secretary.*

## PUBLIC LANDS—AGRICULTURAL COLLEGE—ACT OF JUNE 25, 1910.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., August 2, 1910.*

REGISTER AND RECEIVER,  
*Denver, Colorado.*

SIRS: The act of Congress approved June 25, 1910 (Public, No. 302), provides:

That the Secretary of the Interior is hereby authorized and directed to convey to the State of Colorado for the use and benefit of the State Agricultural College, at Fort Collins, Colorado, for experimental, educational, and kindred uses in forestry, agriculture, horticulture, grazing, stock raising and such other uses included in the work of experiments and instruction at said college, and the experiment station connected therewith, one thousand six hundred acres of vacant, unoccupied, unentered and non-mineral land or so much thereof as the state board of agriculture may select and designate, upon the payment therefor of the sum of one dollar and twenty-five cents per acre.

SEC. 2. That said lands shall be selected by said state board of agriculture from any vacant, unoccupied and unentered, non-mineral public land in township seven north, ranges seventy, seventy-one, seventy-two, seventy-three and seventy-four west, of the sixth principal meridian, in the county of Larimer, State of Colorado, and the tracts so selected shall not contain less than forty nor more than one hundred and sixty acres each.

Selections may be made under the provisions of this act from any "vacant, unoccupied and unentered, non-mineral public land" in the townships mentioned, and, while it is true a portion of these lands are now embraced within the boundaries of the Medicine Bow national forest, namely, township seven north, ranges seventy-three and seventy-four west, and the west one-half of section two, sections three to nine, sixteen to twenty-one, and twenty-six to thirty-five, inclusive, in township seven north, range seventy-two west, the act contemplates the making of selections within such national forest, and any lands of the character contemplated, within the five townships described, may be selected. The selections must be supported by the usual non-mineral, non-saline and non-occupancy affidavits.

Upon acceptance by you of any selections under the provisions of said act, you will issue the usual receipt and certificate, so modified as to show that the lands are purchased under the provisions of the act mentioned, with a reference to this letter, by initial and date. The papers will thereafter be transmitted to the General Land Office.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved, August 2, 1910:

FRANK PIERCE,  
*Acting Secretary.*

## REPAYMENT—ACT OF JUNE 16, 1880.

## INSTRUCTIONS.

## DEPARTMENT OF THE INTERIOR,

## GENERAL LAND OFFICE,

*Washington, D. C., July 23, 1910.**To Registers and Receivers of United States Land Offices.*

## GENTLEMEN:

Your attention is called to the following provisions of the act of Congress approved June 16, 1880 (21 Stat., 287), entitled "An Act for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands:"

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled "An Act to amend an act entitled 'An Act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States,' and amendments thereto," approved March third, eighteen hundred and seventy-three, and now incorporated in section twenty-three hundred and six of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon canceled, the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase money on lands erroneously sold by the United States.

SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

SEC. 3. The Secretary of the Interior is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

SEC. 4. The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary instructions, to carry the provisions of this act into effect; and for the repayment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury and the same shall be paid without regard to the date of cancellation of the entries.

The foregoing act is additional to the provisions of sections 2362 and 2363, United States Revised Statutes.

## APPLICATIONS.

1. Applications for repayment of fee, commissions, excess and purchase money should be made in the following or equivalent form:

To the COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I hereby make application for repayment of the purchase money paid on entry of the — of section —, township —, range —, as per certificate No. —, issued at —, bearing date the — day of —, 1—.

(Applicant sign here. Give P. O. address.) —, —.

STATE OF — } ss.  
COUNTY OF — }

On this — day of —, 19—, before the subscriber, a — in and for said county, personally came —, to me well known to be the person who subscribed the foregoing application, who, being duly sworn, on — oath, declares that — ha— not sold, assigned, nor in any manner encumbered, the title to the tract of land described in said application, and that the same has not become a matter of record.

(Applicant sign here.) — —.

Subscribed and sworn to before me this — day of —, A. D. 19—.

The affidavit may be made before the register or receiver, or any officer authorized to administer oaths. When made before a justice of the peace, a certificate of official character is required.

## FEES, COMMISSIONS, EXCESSES, ETC.

*On fraudulent and void additional soldier and sailor entries.*

2. The first section of the act authorizes the payment "to innocent parties" of the fees, commissions, etc., paid by them on fraudulent and void additional soldier and sailor homestead entries which have been canceled.

- Repayment of fees, commissions, and excesses under section 1 can be made only to the party who paid the same. A conveyance of the land in these cases will not be deemed to carry with it the right to repayment.

Applications for repayment under this section must be accompanied by the duplicate receipt, or evidence of the loss of the same, and by a concise statement under oath setting forth all the facts and circumstances connected with the procurement and use of the fraudulent papers upon which the canceled entries were based, together with such documentary or other proof as may tend to establish the innocence of the parties relative thereto.

*On entries canceled for conflict, or where the same have been erroneously allowed and can not be confirmed.*

The first clause of the second section of the act provides:

3. For the repayment of purchase money and of fees, commissions, and excess payments, where entries of public lands are canceled for

conflict, "or where, from any cause, the entry has been erroneously allowed and can not be confirmed."

In the case of applications for the payment of fees, commissions, etc., on canceled homestead and other entries, under the *second* section of the act, the duplicate receipt or duplicate certificate must be surrendered, together with a relinquishment in the following or equivalent form:

\_\_\_\_\_, 19\_\_\_\_.

I hereby relinquish to the United States all my right, title, and claim in and to the land described in receipt No. \_\_\_\_\_, issued at \_\_\_\_\_, \_\_\_\_\_, 1\_\_\_\_, being for the \_\_\_\_\_ of section \_\_\_\_\_, township \_\_\_\_\_, and range \_\_\_\_\_.

Witness: \_\_\_\_\_

Acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

This relinquishment may be acknowledged before the register or receiver or before any officer authorized to take acknowledgments.

4. If the duplicate receipt or duplicate certificate has been lost or destroyed, an affidavit stating the fact must be furnished, together with a relinquishment in effect as in the above form.

#### DOUBLE-MINIMUM EXCESS.

The last clause of the *second* section of the act provides that "in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of \$1.25 per acre shall in like manner be repaid to the purchaser thereof or to the heirs or assigns."

5. Applications for repayment of double-minimum excess should be made in the following form:

To the COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: \_\_\_\_\_ hereby make application for repayment of the double-minimum excess paid on entry of the \_\_\_\_\_ of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, as per certificate No. \_\_\_\_\_, issued at \_\_\_\_\_, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 1\_\_\_\_.

(Applicant sign here. Give P. O. address.) \_\_\_\_\_,

COUNTY OF \_\_\_\_\_ }  
STATE OF \_\_\_\_\_ } ss.

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before the subscriber, a \_\_\_\_\_ in and for said county, personally came \_\_\_\_\_, to me well known to be the person who subscribed to the foregoing application, who, being duly sworn, on \_\_\_\_\_ oath declares that \_\_\_\_\_ has not sold or assigned \_\_\_\_\_ right in any way to the double-minimum excess described in said application.

(Applicant sign here.) \_\_\_\_\_.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19\_\_\_\_.

6. The applicant must also furnish a corroborated affidavit showing that he is the identical party who made the entry on which repayment is claimed.

Repayment of double-minimum excess will be made only to the original entryman, his heirs or assigns. The sale and transfer of the land is not of itself treated as an assignment of the right to receive repayment of double-minimum excess.

#### PURCHASE MONEY.

*Where patent has not been issued, and the title has not otherwise become a matter of record.*

7. In applications for repayment where patent has not issued, the duplicate receipt or duplicate certificate must be surrendered. The applicant must make affidavit that he has not transferred or otherwise encumbered the title to the land and that the same has not become a matter of record.

Where the duplicate receipt or duplicate certificate has been lost or destroyed, a certificate will also be required from the proper recording officer, showing that the same has not become a matter of record and that there is no incumbrance of the title to the land thereunder. A like certificate must be furnished when the application is made by another than the original purchaser.

*Where title has become a matter of record.*

8. Where the title has become a matter of record, and in all cases where patent has issued, a duly executed deed, relinquishing to the United States all right and claim to the land under the entry or patent, must accompany the application. This deed must be duly recorded, and a certificate must also be produced from the proper recording officer where the land is situated, showing that said deed is so recorded and that the records of his office do not exhibit any other conveyance or incumbrance of the title to the land.

Where a valid title to the land embraced in a canceled entry has been conveyed by the Government to other parties, the applicant for repayment under such canceled entry must reconvey to the United States the title derived from such invalid entry. If, however, the applicant has acquired the valid title already conveyed by the United States, it will not be necessary for him to reconvey the land, but he may make a full statement, with corroborative evidence of the facts, waiving all claim under the invalid entry, and thereupon receive repayment of the amount erroneously paid.

The reconveyance to the United States must conform in every particular to the laws of the State or Territory in which the land is located relative to transfers of real property; in the case of a married man, in



localities where the right of dower exists, there must be a release of dower by the wife, and in case of an executor or administrator, due proof of authority to alienate the estate.

Where a patent has been executed and delivered it must be surrendered.

#### HEIRS, EXECUTORS, ADMINISTRATORS, AND ASSIGNEES.

9. Where application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained, and must show that the parties applying are the heirs and the only heirs of the deceased.

10. Where application is made by executors, a certificate of executorship from the probate court must accompany the application.

11. Where application is made by administrators, the original, or a certified copy, of the letters of administration must be furnished.

12. Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instruments of assignment, or certified copies thereof, and also show by affidavits or otherwise that they have not been indemnified by their grantors or assignors for the failure of title, and that title has not been perfected in them by their grantors through other sources.

13. Where there has been a conveyance of the land and the original purchaser applies for repayment, he must show that he has indemnified his assignee or perfected the title in him through another source, or produce a full reconveyance to himself from the last grantee or assignee.

#### ASSIGNEES.

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law. To construe said statutes so as to recognize the assignment or transfer of the mere claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or attempted transfer of title thereto, would be against the settled policy of the Government and repugnant to section 3477 of the Revised Statutes. (2 Lawrence, First Comp. Dec., 264, 266, and 6 Dec. Comp. of the Treasury, 334, 359.)

Assignees of land who purchase after entry are, in general, deemed entitled to receive the repayment when the lands are found to have been erroneously sold by the Government. But this rule does not apply to the repayment of double-minimum excesses. (First Comp. Dec. in case of Adrian B. Owens, Copp's Pub. Land Laws, 1890, vol. 2, p. 1238.)

## DEFINITION OF "ERRONEOUSLY ALLOWED."

This can not be given an interpretation of such latitude as would countenance fraud. If the records of the Land Office, or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be "erroneously allowed." But if a tract of land were subject to entry, and the proofs showed a compliance with law, and the entry should be canceled because the proofs were shown to be false, it could not be held that the entry was "erroneously allowed;" and in such case repayment would not be authorized.

## TRANSMITTAL OF APPLICATIONS.

14. Applications for repayment may be filed either in this office or in the proper district land office.

When an application is filed in the district land office the register and receiver shall transmit the same with a full report of the facts in the case, as shown by their official records, and recommend either the allowance or the disallowance of the claim. When an application is filed, either in the district land office or in this office, it should be accompanied by a statement setting forth fully the grounds upon which repayment is claimed.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved July 23, 1910.

FRANK PIERCE, *Acting Secretary.*

## REPAYMENT—ACT OF MARCH 26, 1908.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., July 23, 1910.*

*To Registers and Receivers of United States Land Offices.*

GENTLEMEN:

Your attention is called to the following provisions of the act of Congress approved March 26, 1908 (35 Stat., 48), entitled "An act to provide for the repayment of certain commissions, excess payments, and purchase moneys paid under the public land laws:"

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither*

such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

Sec. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

Sec. 3. That when the Commissioner of the General Land Office shall ascertain the amount of any excess moneys, purchase moneys, or commissions in any case where repayment is authorized by this statute, the Secretary of the Interior shall at once certify such amounts to the Secretary of the Treasury, who is hereby authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and issue his warrant in settlement thereof.

The foregoing act is additional to the provisions of sections 2362 and 2363, United States Revised Statutes, and to the act of June 16, 1880 (21 Stat., 287).

The first section authorizes the return to the applicant, or to his legal representatives, of purchase moneys and commissions covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, where such application has been or shall hereafter be rejected, in cases where neither the applicant nor his or her legal representatives shall have been guilty of any fraud or attempted fraud in connection with said application.

This section refers more particularly to moneys covered into the Treasury of the United States as directed in office circular "M" of May 16, 1907 (35 L. D., 568), and circular letter "M" of July 26, 1907; that is, moneys deposited with proof under the timber and stone, desert land, coal land, or mineral land laws.

#### APPLICATIONS.

Applications for repayment under this section should be made in the following or equivalent form:

*To the Commissioner of the General Land Office.*

SIR:

I hereby make application for the return of the purchase money and commissions paid with my — under the — law, for the — of section —, township —, range —, as per receiver's receipt No. —, issued at —, bearing date the — day of —, 19—, and which is surrendered herewith, and on oath declare that I am the identical (or legal representative of the) person who made said payment, and that there was no fraud or attempted fraud in connection with the effort to obtain title to the described tract of land.<sup>a</sup> —

(Applicant sign here.) — —,

(P. O. address.) — —, — —.

State of — }  
County of — } ss.

Subscribed and sworn to before me this — day of —, 19—. — —.

<sup>a</sup> If the receipt has been lost or destroyed, so state.

The affidavit may be made before the register or receiver, or any officer authorized to administer oaths. When made before a justice of the peace, a certificate of official character is required.

The *second* section authorizes the return to the person who made the payment, or to his legal representatives, of any moneys paid under any of the land laws of the United States, in excess of the legal requirements.

#### APPLICATIONS.

Applications for repayment under this section should be made in the following or equivalent form:

*To the Commissioner of the General Land Office.*

SIR:

I hereby make application for the return of the amount paid in excess of the lawful requirements on entry of the — of section —, township —, range —, as per receiver's receipt No. —, issued at —, bearing date the — day of —, 19—, and on oath declare that I am the identical (or legal representative of the) person who made said payment.

(Applicant sign here.) —, —,  
(P. O. address.) —, —.

State of — }  
County of — } ss.

Subscribed and sworn to before me this — day of —, 19—.

— —  
— —

Affidavits in this class of claims may also be made before the register or receiver, or any officer authorized to administer oaths. When made before a justice of the peace, a certificate of official character is required.

#### HEIRS, EXECUTORS, AND ADMINISTRATORS.

Where application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained, and must show that the parties applying are the heirs and the only heirs of the deceased.

Where application is made by executors, a certificate of executorship from the probate court must accompany the application.

Where application is made by administrators, the original, or a certified copy, of the letters of administration must be furnished.

Section 3477, United States Revised Statutes, prohibits the transfer or assignment of claims against the United States, and, therefore, any attempted transfer or assignment of a claim under either of the before-mentioned sections can not be recognized.

## TRANSMITTAL OF APPLICATIONS.

Applications for repayment may be filed either in this office or in the proper district land office.

When an application is filed in the district land office the register and receiver shall transmit the same with a full report of the facts in the case, as shown by their official records, and recommend either the allowance or the disallowance of the claim.

The third section of the act directs the Secretary of the Interior to at once certify to the Secretary of the Treasury the amount of any excess moneys, purchase moneys, or commissions, ascertained by the Commissioner of the General Land Office to be due under this act, and the Secretary of the Treasury is authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and to issue his warrant in settlement thereof.

## CREDIT FOR PRIOR PAYMENT IN SECOND APPLICATION TO COMMUTE.

In cases where the commutation homestead proof, upon which you have issued certificate and receipt, has been rejected by this office, the certificate canceled and the original entry allowed to stand subject to future compliance with the law, if second commutation proof is accepted and credit is allowed for the purchase money paid on the first proof, the register will issue his certificate, bearing proper number and date, noting thereon:

Purchase money, \$—— paid, ——, 19——, per receiver's receipt No. ——.

The receiver will show on his "Abstract of collections on commuted homesteads" the date of the register's certificate, the name of the entryman, and the purchase money in the proper columns, in (    ), with the above notation on a separate line. The amount will not be included in the footing.

The receiver will issue receipt (Form 4-131) for testimony fees paid on the second proof, with notation to show that the "purchase money was paid ——, 19——, per receiver's receipt No. ——."

Before allowing credit on account of payment in a prior canceled cash entry, as hereinbefore set forth, the register and receiver are charged with the duty of securing the approval of the Commissioner of the General Land Office therefor.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved July 23, 1910.

FRANK PIERCE, *Acting Secretary.*

## CONTESTS AND PROTESTS—NOTATION OF RECORD IN LOCAL OFFICE.

## CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., August 4, 1910.**Registers and Receivers, United States District Land Offices,**and Chiefs of Field Divisions, General Land Office.*

GENTLEMEN:

1. It has been determined, to the end that the records of each and every district land office shall hereafter present a full and complete history of and concerning a claim to, or entry of, public lands, therein asserted, or made, including herein the origin, prosecution, and ultimate disposition of any and every kind of adverse proceedings against such claim, or entry, that the records of said offices shall disclose the initiation and conclusion of any and all contests and protests therein filed and presented. Pursuant to this conclusion, Chiefs of Field Divisions are hereby directed, in any and all cases wherein they shall receive a complaint, or any information, impeaching the validity of any claim to a tract of public land, or any direction to proceed to an investigation relative to the validity, or invalidity, of any such claim, to communicate to the Register and Receiver, within whose territorial jurisdiction the involved land may be situate, a formal written protest against said claim, or entry, which protest may be substantially of the form following, to wit:

REGISTER AND RECEIVER,

*United States District Land Office.*

GENTLEMEN:

It has been represented to me that there is good and sufficient reason why the homestead entry of John Doe, serial No. (07542), embracing the NE.  $\frac{1}{4}$  of sec. 12, T. 14 N, R. 7 W., B. H. M., should not be permitted to proceed to patent until the validity, or invalidity, thereof has been carefully investigated and determined, it being alleged that said entry has not been initiated, or maintained, in accordance with the law authorizing such entries. You are, therefore, hereby advised, that it is my purpose promptly to proceed to such an investigation; and I do now and hereby protest against the acceptance of any proof which may be submitted in support of said entry, or the issuance and delivery to said entryman of any evidence of right or title to the lands covered thereby, requesting that my said protest may be by you duly noted upon the records of your office, to the end that the same may become and be known to all persons who may in any wise be interested in said entry, and that thereafter, it may by you be duly forwarded to the Commissioner of the General Land Office, at Washington, D. C., for his information in the premises.

Respectfully,

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*Chief of Field Division.*

2. Upon receipt of any such protest, the Register will cause same to be duly noted in the Serial Number Register, in like manner as

other papers and documents pertaining to any public land entry, or claim, are required to be noted by paragraph 18 of the circular of June 10, 1908 (37 L. D., 46), regulating the method of keeping records and accounts relative to the public lands, and, as well, at the proper place in the tract book in which such entry or claim is recorded.

3. In like manner, and for the same reason, when an affidavit or other written instrument is filed in a district land office by any person offering contest against any claim to a specified and described tract of public lands, or protesting against the allowance or perfection of the claim made under and by virtue of said entry, the Register will make due and proper notation concerning the receipt and filing of said affidavit, or other writing, in accordance with the instructions contained in the foregoing paragraphs hereof.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved August 4, 1910.

FRANK PIERCE, *Acting Secretary.*

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**HOMESTEAD ENTRY—WIDOW—RIGHTS OF WIFE OF ENTRYMAN  
SENTENCED TO LIFE IMPRISONMENT.**

BELLE WILLIAMS.

Under the provision of the homestead law which confers upon the widow of a deceased entryman the right to complete the entry, the wife of an entryman sentenced to the penitentiary for life is entitled to perfect the entry in like manner as if the entryman were actually dead.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, August 6, 1910.* (S. W. W.)

This case involves the right of a woman whose husband has been sentenced to the penitentiary for life, to make proof and acquire title in her own name on an entry previously made by her husband, who was convicted and sentenced before completing the requirements of the homestead law, and is before the Department on the appeal of Belle Williams from your office decision of April 2, 1910, holding for cancellation the final certificate which was issued to her for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 17, T. 25 N., R. 18 W., Woodward, Oklahoma, land district.

It appears from the records and your said decision that on March 30, 1904, Charles M. Williams made homestead entry, No. 22132, for the said tract of land; that he lived on the land with his wife for something more than two years, and during the year 1907 went to the State of Kansas, where he was convicted of murder in the year 1908 and was sentenced to the State penitentiary for life; that his

wife has not been on the land since she left it with her husband in April, 1907, but that seventeen acres thereof have been cultivated every year since. Proof was made by Belle Williams, upon which the local office issued final certificate 08152 in her name, on July 13, 1909.

Your office decision under consideration required Belle Williams to furnish evidence that she is the legally appointed agent or guardian of the entryman, and, further, required her to show cause why a certificate which issued in her name should not be corrected and issued in the name of the entryman.

Under the homestead law, upon the death of an entryman the right to complete the entry is cast upon the widow. True, this entryman is not actually dead, but, under the laws of Oklahoma, a person who is convicted and sentenced to the penitentiary for the term of his natural life, is thereby deemed civilly dead; and under the laws of the State of Kansas, where the husband of this woman is confined in the penitentiary, whenever any person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be administered and disposed of in all respects as if he were actually dead. (Section 5399, General Statutes, 1889.)

The Department is aware that in the case of William Deary (31 L. D., 19), it was stated that the wife of a man *civiliter mortuus* is not his widow, but that was mere *obiter* because it was expressly held in that case that the Department would not be justified in holding that the man was civilly dead, as there was nothing to show that he had ever been declared to be of unsound mind. Moreover, what was said in that case respecting this subject is not controlling of the questions involved in this case.

The Department is of the opinion that, within the meaning of the homestead law, which confers upon the widow of a deceased entryman the right to complete an entry regularly made by him, a man who is sentenced to the penitentiary for life is dead, and that his wife should be allowed to complete the entry in like manner as if the man were actually dead.

If, therefore, no other objections appear the patent should issue in accordance with the certificate.

Your office decision is reversed.

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#### REPAYMENT—HOMESTEAD COMMUTATION—REJECTION OF PROOF.

OTTO WESTFALL.

Where the cash certificate issued upon commutation proof is canceled and the proof rejected, on the ground that the entryman had not sufficiently complied with law to entitle him to commute, and the entry is permitted to remain intact subject to future compliance with law, the entryman is not entitled to repayment of the commutation purchase money paid upon his



entry; and the only relief to which he is lawfully entitled is that, upon subsequently showing proper compliance with law, he may have the money paid in connection with his first application to commute credited upon a second such application.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, August 8, 1910.* (C. J. G.)

An appeal has been filed by Otto Westfall from the decision of your office of February 19, 1910, denying application for repayment of purchase money paid by him upon commuting his homestead entry for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 34, T. 16 N., R. 25 W., Missoula, Montana.

The original homestead entry of Westfall was made June 4, 1904, upon which he submitted commutation proof December 4, 1906, and cash certificate issued December 12, 1906. The land was included in the Lolo National Forest Reserve, November 6, 1906.

Upon report of a forest officer charging, as a result of an examination made in January, 1907, that Westfall had failed to reside upon and cultivate the land, and that he had entered it for the purpose of securing the timber thereon, your office, on March 8, 1907, directed proceedings against his entry. A hearing was had and upon the testimony submitted the local officers recommended rejection of Westfall's commutation proof on the ground of insufficient cultivation, but that his entry be allowed to remain intact subject to future compliance with law. Upon appeal, your office on November 3, 1909, found that Westfall's entry was not made in good faith, and accordingly held both his cash certificate and original entry for cancellation, thus modifying the action recommended by the local officers. Upon further appeal, the Department on April 22, 1910, modified the decision of your office by canceling Westfall's cash certificate and allowing his entry to remain intact subject to further proof of compliance with law.

The application for repayment is made under section one of the act of March 26, 1908 (35 Stat., 48), which provides:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

The purpose of this act was to authorize repayment where money is covered into the Treasury "under any application to make any filing, location, selection, entry, or proof," and in the process of adjudication such application is rejected, the applicant or his legal

representatives not being guilty of fraud or attempted fraud in the transaction. In the instructions of April 29, 1908 (36 L. D., 388), issued under said act, it was said as to section one thereof:

This section refers more particularly to moneys covered into the Treasury of the United States as directed in office circular "M" of May 16, 1907 (35 L. D., 568), and circular "M" of July 26, 1907; that is, moneys deposited with proof under the timber and stone, desert-land, coal land, or mineral land laws.

The application of Westfall is not one coming within the provisions of the act because he was allowed to make homestead entry, and his application to commute the same was not rejected, but, on the contrary, was accepted and cash certificate issued, which was only canceled after a hearing which developed that he had not sufficiently complied with law to entitle him to commute. It is therefore immaterial, so far as this act is concerned, whether or not he was guilty of fraud or attempted fraud in connection with his commutation proof.

The application of Westfall for repayment was denied by your office on the ground that, although upon the proofs presented he was properly allowed to commute his homestead entry, such proofs were shown at the hearing subsequently had to have been "misleading and untrue both as to residence upon and cultivation of the land." No reference was made by your office in departmental decision of April 22, 1910. The only theory upon which Westfall's application for repayment could be granted is that upon the face of his proof he was "erroneously allowed" to commute his homestead entry, said application thus coming under the act of June 16, 1880 (21 Stat., 287). On that point there is doubt to say the least whether taking said proof as a whole the action of the local officers in accepting the same was not reasonably justified, especially in the matter of cultivation. Before any action by your office on the proof, the charges of the forest officer intervened. In the light of facts developed at the subsequent hearing the local officers found that there was practically a failure to cultivate the land. They accordingly recommended rejection of the commutation proof, but that Westfall's original entry be allowed to remain intact, subject to future compliance with law. Your office held, however, that Westfall's homestead entry was not made in good faith, and that, in addition to the rejection of his commutation proof, his original entry should be canceled. The action of the Department was in line with the recommendation of the local officers, but was not necessarily an adjudication that Westfall was entirely guiltless of any fraud or attempted fraud in the premises.

In a technical sense this is not a case that otherwise comes within the act of June 16, 1880, for the reason that Westfall's homestead entry has not been canceled for any cause, as contemplated by said act. Only the cash certificate issued to him has been canceled because of insufficient compliance with the commutation provisions

of the homestead law, and upon future showing of compliance with law his entry can be confirmed. The ruling formerly was that by commutation the original was merged into the cash entry, and that the cancellation of the latter involved a cancellation of the former. In some cases this rule has been so far modified as to allow the original entry, where commutation proof is rejected, to remain intact, subject to future compliance with law. The further privilege has also been extended in allowing credit for the prior payment in case of a second application to commute. But it has been held that "repayment, with the right to thereafter submit the ordinary homestead proof, can not be accorded to a homesteader who has made commutation proof, which is found insufficient; but he may submit new commutation proof within the life of the original entry." August Polzin (8 L. D., 84). It has likewise been held that the fact that a homesteader was entitled to take the land under the ordinary homestead law will not authorize repayment if he elects to make a commuted cash entry therefor. Truman L. Hodge (9 L. D., 261). See also cases of Alpheus R. Barringer (12 L. D., 623), and Elizabeth C. Ward (21 L. D., 287).

Having made regular homestead entry, the election of Westfall to commute the same was an entirely voluntary act with him. But having so elected, he thereby assumed the burden of showing full compliance with law, both as to residence and cultivation. It was upon his representations alone that the local officers accepted his commutation proof and issued cash certificate, and of course there is no room for complaint on his part that they gave full faith and credit to his statements. It was developed at the subsequent hearing that he had not sufficiently complied with law, and such certificate had to be canceled. It is sufficient to say that upon the entire record the Department might very well have canceled both the original entry and cash certificate issued upon Westfall's commutation proof. The explanation that this course was not pursued is that, although such proof had to be rejected because of shown failure to sufficiently comply with law, yet there was no evidence of such wilful misrepresentation in his proof as to bar the granting of the benefit of the changed ruling and allowing his original entry to remain intact subject to future compliance with law. In other words, that under all the circumstances the rejection of his commutation proof and cancellation of his cash certificate were deemed adequate, without also canceling his original homestead entry.

The only relief to which Westfall is lawfully entitled is that, upon showing proper compliance with law, he may have the money paid upon his first application to commute credited upon a second such application.

The decision of your office herein is affirmed.

## COAL LANDS—WITHDRAWALS—CLASSIFICATION.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., August 8, 1910.*

REGISTER AND RECEIVER,  
LEMMON, SOUTH DAKOTA.

GENTLEMEN: By office letter "N" of July 21, 1910, you were advised that the President had, by order dated July 7, 1910, withdrawn from settlement, location, sale, and entry and reserved for examination and classification with respect to coal values, subject to the provisions, limitations, exceptions, and conditions of the act of June 25, 1910 (Public, No. 303), and the act of June 22, 1910 (Public, No. 227), certain lands in North Dakota and South Dakota, particularly described in the lists accompanying said letter.

Considerable uneasiness having resulted in your district, due probably to an improper interpretation of the order, the following instructions are issued for your guidance:

It will be observed that the act of June 25, 1910, which authorizes the President to make withdrawals of lands in certain cases, expressly excepts from the operation of any withdrawal made thereunder all lands which are on the date of such withdrawal embraced in any lawful homestead or desert land entry theretofore made, or upon which any valid settlement has been made, and is at said date being maintained and perfected pursuant to law. Inasmuch as the order of July 7, 1910, was issued subject to the conditions, limitations, and exceptions of the said act of June 25, it follows that lands embraced in any valid homestead or desert-land entry were excepted from the operation of the order.

However, while the President's order of withdrawal did not affect any entries of the classes named which were made prior thereto, nevertheless the information furnished by the Geological Survey upon which the order was based, would seem to constitute a claim or report that the lands involved are valuable for coal within the meaning of the act of March 3, 1909 (35 Stat., 844), and in disposing of proofs offered on such entries your office will be governed by the regulations contained in the circular of September 7, 1909 (38 L. D., 183), and April 18, 1910 (38 L. D., 576).

However, in view of the provisions of the act of June 22, 1910 (Public, No. 227), under the terms of which agricultural entries of certain classes may be made on lands classified as coal lands, and patent secured with a reservation to the United States of the coal in such lands and the right to prospect for, mine, and remove the same, there would seem to be no occasion for requiring such entrymen who submit proof, electing to take a surface patent, to make any special

showing of good faith, because bad faith is not to be presumed, and their election to take a surface patent being sufficient evidence of an original intention to acquire title only for agricultural purposes. In this connection it should be noted that upon the cancellation of such an entry, another might be at once made under the act of June 22, 1910.

By reference to the President's order of July 7, it will be seen that the lands were withdrawn not only subject to the conditions, limitations, and exceptions of the withdrawal act of June 25, but also to the terms and conditions of the act of June 22, which provides for agricultural entries on coal lands. The apparent purpose of the reference to the latter act was to so limit the withdrawal as to withhold the lands from only those forms of entry not authorized by the second section of the act of June 22, because the lands were withdrawn for the purpose of classifying the same with respect to their coal values, and even when the classification shall have been made and the lands found to be chiefly valuable for coal the surface of such lands will nevertheless be subject to entry, as provided in section two of said act.

In this connection it should be stated, however, that applications for such lands should be specifically made subject to the provisions of the act of June 22, *in the event that the lands are classified as valuable for coal*, because entrymen should not be compelled to receive patents for the surface only if in fact the lands are thereafter shown not to contain valuable coal.

To the end that the uneasiness and apprehension existing throughout your district among those who have made homestead entries, and others who possibly contemplate making entries for such lands, may be relieved, you will give as much publicity as possible to these instructions.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

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#### NOTICE OF CLAIM TO WITHDRAWN COAL LANDS.

##### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE.

*Washington, D. C., August 10, 1910.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: The circular dated March 21, 1908 (36 L. D., 318), can have no further application, and the notices of claim therein provided for

will not be received or filed where coal-land withdrawals are made under the act of June 25, 1910 (Public, No. 303). Said circular is accordingly hereby revoked.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

**SCHOOL LANDS—INDEMNITY—MINERAL RETURN—SUBSTITUTION OF BASE.**

**STATE OF CALIFORNIA.**

Where a State makes indemnity selection in lieu of school sections returned as mineral at the time of survey, and is unable to establish the mineral character of the base lands, it should be permitted, inasmuch as the selections were *prima facie* valid when made, to assign other valid bases to support the selections, notwithstanding the selected lands may have since been included within a national forest.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(W. C. P.) *Land Office, August 16, 1910.* (S. W. W.)

This is the appeal of the State of California from your office decision of January 24, 1910, requiring the State to file an *ex parte* showing of the mineral character of the bases assigned by it in support of school indemnity selections embraced in List No. 621, described as lots 1, 2, 3, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , and E.  $\frac{1}{2}$  of Sec. 19, T. 44 N., R. 3 E., Redding, California, land district.

It appears that the base lands, which are situated in T. 2 S., R. 5 E., San Bernardino meridian, were returned by the survey as mineral, and as this constituted the only evidence of the mineral character of said base lands, your office has required an additional showing in the premises.

The selected lands, having been included within the Shasta National Forest by the President's proclamation of March 2, 1909, the question is presented as to the right of the State to substitute valid bases in support of these selections, in the event that the mineral character of the bases already assigned can not be established.

It appears from affidavits and petitions accompanying the appeal that the State sold the selected lands years ago to parties who purchased in good faith, and it is urged that in the event that the showing of the mineral character of the bases assigned in support of the selections is not satisfactory, the State should be allowed to substitute good and sufficient bases in support of the selections.

This Department has repeatedly held that a mineral return by the surveyor-general does not have the effect to establish the character of the lands as chiefly valuable for mineral (27 L. D., 1; 32 L. D., 117). It follows, therefore, that your office was justified in demanding additional evidence of the mineral character of the base lands assigned in support of these selections.

However, inasmuch as the selections were *prima facie* valid when made, it is believed that if the State is unable to establish the mineral character of the base lands assigned, it should be allowed a reasonable time, to be fixed by your office, within which to assign valid bases, notwithstanding the fact that the lands have since been included within a national forest, because, under the proclamation creating the forest, lands which were legally appropriated were excepted from the operation thereof.

As thus modified your office decision is affirmed.

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NOTICE TO HOMESTEAD ENTRYMEN OF EXPIRATION OF FIVE YEARS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 18, 1910.

REGISTERS AND RECEIVERS,

*United States Land Offices.*

GENTLEMEN: The circular of September 9, 1874 (Copp's Public Land Laws, 1875, p. 244), providing for the issuance of notices to homestead entrymen of the expiration of five years after the dates of their entries, is hereby revoked. You will discontinue the practice of issuing such notices, and you will destroy all Forms 4-343 that you have on hand.

These instructions do not in any way affect the circular of December 20, 1873 (Copp's Public Land Laws, 1875, p. 244), providing for the issuance of seven-year notices, and you will continue to issue such notices, on Form 4-344, promptly on the expiration of seven years after the date of all homestead entries, unless your records show some reason for not doing so.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

**PRACTICE—PERSONAL NOTICE TO CONTESTANT OF PREFERENCE RIGHT.****SAUGSTAD v. FAY.**

Notice of the cancellation of an entry under contest and of contestant's preference right of entry, addressed to contestant but sent through his attorney, is not notice to contestant until actually received by him, and the thirty-day period within which he may exercise his preference right does not begin to run until the notice has been so received.

Direction given that all notices advising contestants of the cancellation of the contested entries and of their right to apply to make entry of the land in virtue of the preference right accorded by the statute shall be sent to contestant personally at his address of record.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(W. C. P.)      *Land Office, August 22, 1910.*      (E. F. B.)

This appeal is filed by Norman Saugstad from the decision of your office of May 12, 1910, affirming the action of the local office, rejecting his application to make entry of lots 3 and 4, Sec. 3, T. 154 N., R. 87 W., Minot, North Dakota, in virtue of his preference right as a successful contestant of a former entry of said land made by one Doris C. Glassner.

A hearing upon said contest was had March 16, 1909, both parties being present, and considerable testimony was taken. Before the local officers made a decision in said case a relinquishment of Glassner's entry was filed, to wit, March 20, 1909, and Ned Fay applied to make entry of the land. Fay's application was suspended for the usual period in which the contestant is allowed to exercise his preference right.

Written notice of the cancellation of said entry to "Norman Saugstad, % James Johnson, Minot, North Dakota," advising him that said entry had been canceled by relinquishment and that "said land will be subject to your preference right to make entry thereof within thirty days from this notice," was inclosed in an envelope, addressed to "James Johnson, attorney for Norman Saugstad," and was received by said Johnson March 25, 1909, as shown by the return registry receipt.

It does not appear when Johnson forwarded the notice to Saugstad, but it is admitted by Saugstad that it came to his hands March 29, 1909, from which it may be reasonably inferred that as the letter was addressed to Johnson, he opened the envelope, which he had a right to do, and seeing that the notice was not to himself but to his client Saugstad, forwarded the notice in order that his client might determine what action he would take thereon.

On April 26, 1909, within thirty days from receipt of said notice by Saugstad, he appeared at the local office and tendered his application to make homestead entry of the land, alleging that he would



arrive at the age of twenty-one years at the end of that day, from which it may be reasonably inferred that the 27th day of April was the anniversary of his birth. It does not appear what action was taken by the register and receiver at that time, but the next day he renewed his application, alleging that he was "over twenty-one years of age." The following day, April 28, the local officers rejected the application filed April 26, for the reason that Saugstad had failed to show that he was twenty-one years of age, and on the same day they rejected the application filed April 27, for the reason that "the preference right of entry to said tract expired on April 26, 1909, and there is an application for said land held in abeyance under such preference right." Saugstad was allowed thirty days in which to appeal.

Your office affirmed the decision of the local officers, upon the ground that "notice to an attorney is notice to the client, who is bound by the notice to the attorney," and as notice of the preference right was received by Johnson, the attorney of Saugstad, March 25, 1909, the thirty days allowed in which to exercise it expired April 24. For that reason you held that both of Saugstad's applications were filed after the preference right period had expired, and that the rights of Fay had attached under his application, filed March 20, 1909.

If Saugstad is chargeable with constructive notice of the cancellation of Glassner's entry and of his preference right from March 25, 1909, the date of the receipt by Johnson of the envelope containing the notice to Saugstad, the preference right period expired before he tendered either application, but if he is not chargeable with notice until the actual receipt thereof, the preference right period did not expire until April 28, and both applications were in time.

Notice of a decision given to an attorney of record is notice to the client, whether the client receives it or not. He can not avoid the effect of such notice by terminating the employment of the attorney prior to the service of notice unless such fact is disclosed by the record. *Staples v. St. Paul and N. P. Ry. Co.* (25 L. D., 294).

In all cases where parties in interest are represented by attorneys, the attorney is recognized "as fully controlling the cases of their respective clients" (Rule 104) and "notice to the attorney will be deemed notice to the party in interest" (Rule 106).

The reasonableness of this rule is apparent when it is applied to notices of such matters and things as to which the attorney can act for his client and represent him as effectively as if the client himself had been served and appeared in person.

But the rule that notice to the attorney shall be deemed notice to the party in interest has been construed to embrace notice of the cancellation of an entry and of the right of the contestant to exercise a preference right of entry within thirty days from receipt of such

notice, although the right given by the statute can only be exercised by the contestant in person who, if chargeable with notice to his attorney, may in fact remain in ignorance of the essential act which secures to him the preference right of entry accorded by the statute to a successful contestant. See *Thomas Howard* (3 L. D., 409); *George Premo* (9 L. D., 70); *Cochran v. Dwyer* (9 L. D., 478); *Thomas C. Cook* (10 L. D., 324); *Kinsinger v. Peck* (11 L. D., 202); and *Meyer v. Brown* (15 L. D., 307).

The logic of the rule announced in those decisions is not perceptible except upon the theory that the attorney is used as an agency through whom notice will be communicated to the successful contestant. But in such cases where notice is given only to the attorney, the contestant should not be chargeable with notice until it has been actually received by him, or all reasonable means have been exhausted to convey the same, as in cases where the failure to obtain notice is due to the laches of the contestant who fails to give his proper post-office address, or by other negligent acts, which put it out of the power of the officials charged with such duty to serve him in the manner prescribed by the rules. *John P. Drake* (11 L. D., 574).

Notice to the attorney is merely constructive notice to the client. He is chargeable with notice by the rules, but in order to charge anyone with constructive notice, the notice must be given strictly and literally in conformity with the rules. Such was the ruling in *Churchill v. Seeley* (4 L. D., 589) and *Elliott v. Noel* (ib., 73), where verbal notice was held not sufficient under a rule requiring that notice shall be in writing. Also in *Milne v. Dowling* (ib., 378), where actual notice of a pending contest was not sufficient to charge the claimant with notice in the absence of the mailing of written notice by registered letter, as required by the rules. See also *Parker v. Castle* (ib., 84) and *Conly v. Price* (9 L. D., 490), in which it was held that notice of the cancellation of an entry given through the mails should be in strict conformity with Rules 17 and 18 of Practice.

In these cases the rule was recognized that a party may avail himself of any technical advantage of a failure to conform to the rules prescribed for giving notices. That rule applies with greater force where property rights are involved and where the person whose right is affected has no notice except as he may be constructively charged with by reason of notice to his attorney.

It is stated in the argument of counsel that on April 24, 1909, Saugstad filed in the local office his affidavit, stating in substance that "he had received the said notice of preference right on March 29, 1909, and had no notice or knowledge of the cancellation of said entry or of his preference right until that time." That affidavit can not be found with the record and should be supplied, but there is nothing in the record to the contrary, and in the absence of such

admission no proof that Saugstad had any notice of said cancellation until he appeared to make entry at the local office. The preference right period therefore commenced to run from March 29, 1909, unless the mailing of the notice to Johnson, addressed to Saugstad, was notice to the attorney in conformity with the rules.

Notice of the cancellation of Glassner's entry and of Saugstad's preference right could have been given to Johnson, the attorney of Saugstad, and if such notice had been given in conformity with the rules Saugstad, under the decisions above cited, would have been bound thereby, whether he ever received the notice or not.

But no such notice was sent to Johnson. The notice that was mailed to him was addressed to Norman Saugstad, and although Johnson upon opening the letter, as he had a right to do, had actual notice that Saugstad had been notified of the cancellation of Glassner's entry and of the preference right of entry and might, so far as he is concerned, be estopped from denying such actual notice to himself, it was not constructive notice to Saugstad, who was not bound thereby until he actually received the notice. He was therefore entitled to make application to enter at any time within thirty days from the date of actual notice.

In *Weisbeck v. McGee* (36 L. D., 247) it was held that where notice of a decision is given by registered letter, addressed to the party by name, in care of his attorney, notice does not begin to run from the time of delivery of the letter to the attorney, but from the date of its actual receipt by the party himself.

In that case the notice was to the party, in care of his attorney. As the attorney had no right to open the letter, the registered package was inclosed in a letter by the attorney and forwarded to his client. In this case the address on the envelope was to the attorney, who had a right to open it, but when opened he found the notice was to his client and not to himself, and presumably forwarded the notice to the person to whom it was addressed. In principle there is no difference in the two cases.

If the anniversary of Saugstad's birth was the 27th day of April, as may be presumed from the statement in his application of April 26, that he would arrive at the age of 21 years at the end of that day, he was, for all intents and purposes, of age on the 26th day of April, it being a well-established principle that full age is completed on the day preceding the anniversary of a person's birth, as the law takes no notice of fractions of a day. 1st Blackstone, 463; *In re Richardson*, 2d Story, 571, 577.

As Saugstad's application to make entry was tendered within thirty days from receipt of notice of the cancellation of Glassner's entry and of his preference right, he was entitled to make entry of the land, and your decision rejecting his application is overruled.

He will, however, be required to supply the missing affidavit above referred to, and the allowance of his application will depend upon that condition.

In view of what has been stated herein, all notices hereafter issued advising contestants of the cancellation of the contested entry and of their right to apply to make entry of the land in virtue of the preference right given by the statute will be served personally upon the contestants at their address of record.

**ENLARGED HOMESTEAD—ADDITIONAL ENTRY—SECTION 3, ACT OF  
FEBRUARY 19, 1909.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., August 24, 1910.*

THE HONORABLE THE SECRETARY OF THE INTERIOR,

SIR: I enclose herewith copy of form 4-004, application and affidavit for additional homestead, under section 3 of the act of February 19, 1909 (35 Stat., 639). This form was approved by you, in connection with regulations under said act, on March 25, 1909, and December 14, 1909 (38 L. D., 361).

In the case of Alice C. St. John (38 L. D., 577), it was held that a woman who married after the date of the original entry was not disqualified to make an entry under section 3 of the above act, and on page 580 it is stated:

This section is remedial, and is but an enlargement of an existing incomplete homestead entry.

In view of the above, it would appear that the fact that an entryman, after the date of the original entry, had acquired title to more than one hundred and sixty acres of land, would not disqualify him from making an additional entry under the act of February 19, 1909, and I therefore recommend that the words "that I am not the owner of more than one hundred and sixty acres in any State or territory, exclusive of the land included in my original entry above described, and" be omitted from form 4-004. See also in this connection paragraph 14 of circular of April 10, 1909 (37 L. D., 638).

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved:

FRANK PIERCE, *Acting Secretary.*

## CONTEST—RELINQUISHMENT—PREFERENCE RIGHT OF CONTESTANT.

STOCK *v.* HERMAN ET AL.

Where a sufficient affidavit of contest has been filed, entry upon relinquishment of the entry under attack will not be allowed to any person other than the contestant until contestant shall have been duly notified of the filing of the relinquishment and given opportunity during the preferred-right period of thirty days to appear and offer proof that the entryman or some person or persons in privity with him in fact knew of the filing of such affidavit of contest, and that the relinquishment was induced thereby, and upon satisfactory proof that the relinquishment was the result of the contest contestant will be entitled to the usual preference right of entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(W. C. P.) *Land Office, August 27, 1910.* (G. B. G.)

This is the appeal of William J. Stock from your office decision of May 4, 1910, which in effect requires him to show that the relinquishment filed by Oscar E. Herman for homestead entry No. 5985, made March 13, 1907, at Hugo, Colorado, for the NE.  $\frac{1}{4}$ , Sec. 26, T. 13 S., R. 50 W., was the result of Stock's contest, before he be awarded a preference right to enter said land as a result of such contest.

The pertinent facts in this case are stated by the local officers in their decision of March 11, 1910, substantially as follows:

March 13, 1907, the said Oscar E. Herman made homestead entry No. 5985, for the land above described and on January 10, 1910, the said William J. Stock filed a duly corroborated affidavit of contest against said entry alleging that the entryman had never established or maintained a legal residence on the land. Because of a prior contest awaiting disposition, notices were not issued on Stock's affidavit. January 27, 1910, Herman's relinquishment of the entry was filed in the local land office, accompanied by the application of James Gibson—

And in view of the fact that the notices had not been issued and relinquishment evidently not the result of said contest, the application of Gibson was allowed and the contest of William J. Stock was rejected and notices served on attorney for contestant.

February 12, 1910, William J. Stock moved or requested the local land office to issue preference right to him to enter said land, which was rejected on the same day, and February 23, 1910, within the time allowed him, he filed an appeal to your office. Upon that appeal, in your said office decision above referred to, it was held that when Herman's relinquishment was filed Stock had the only valid subsisting contest and he should have been notified of his preference right and that the application of Gibson should have been suspended pending the exercise of such right. And the local officers were directed to—

Notify Stock of his preference right for 30 days and if he should apply to enter during that time you will thereupon suspend his application and order a

hearing of which the parties should have due notice. At such hearing it will be incumbent upon Stock to show that the relinquishment of the entry was the result of his contest and it will be competent for him to show that the former entryman or some one in privity with him in the sale or purchase of the relinquishment had actual knowledge of the filing of the affidavit of contest.

This decision and direction of your office was in keeping with the decision of this Department in the case of *Crook v. Carroll* (37 L. D., 513). It is, however thought necessary to call special attention to the gross error of the local land officers in this case, to the end that it may not be repeated. The question of second entries in the face of a pending contest as considered in *Crook v. Carroll*, *supra*, went only to such entries as might have been allowed by inadvertence. It was not thought that after the rendition of that decision such entries would be purposely allowed, thereby negligently or designedly creating a situation which had theretofore arisen from inadvertence only. In said case speaking of contests in their relation to these inadvertent entries, it was said:

In such cases if the allegations of the affidavit of contest are sufficient if proven to require the cancellation of the entry, then the contestant in instances where actual notice to the contestee does not appear of record should be notified to submit affirmative proof that the entryman's relinquishment was the result of the contest with due notice to the second entryman who may present any counter showing upon this question which he may desire to offer.

No good reason appears why this direction should not be applied in the further development and consideration of this case, but the local officers should be instructed that hereafter in instances where a sufficient affidavit of contest may have been filed, entry upon relinquishment of the entry under attack will not be allowed any person other than the contestant until the contestant shall have been duly notified of the filing of the relinquishment and given the opportunity during the preferred right period of 30 days to appear and offer proof that the entryman or some person or persons in privity with him in fact knew of the filing of such affidavit of contest, and that the relinquishment was induced thereby. Upon satisfactory proof that the relinquishment was the result of the contest the contestant will be entitled to the usual preference right of entry. *Crook v. Carroll*, *supra*.

The decision appealed from is affirmed.

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**ENLARGED HOMESTEAD—RESIDENCE IN VICINITY OF LAND ENTERED  
UNDER SECTION 6, ACT OF FEBRUARY 19, 1909.**

W. L. ROBERTS.

There is no authority for establishing a fixed and arbitrary limit, to be measured either by distance or time, from land entered under section 6 of the enlarged homestead act, within which the entryman must reside; if he successfully farms the land, in person or under his personal supervision, he meets the requirements of the statute.

*Acting Secretary Pierce to Hon. Reed Smoot, Provo, Utah, August*  
(F. W. C.) 30, 1910. (S. W. W.)

I have the honor to acknowledge the receipt of your letter of July 22, inclosing one from Mr. W. L. Roberts, of Salt Lake City, also your further letter of August 10, on the same subject, inclosing a communication to you, dated August 1, from the register of the local land office at Salt Lake City, respecting the interpretation of that part of section 6 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), which provides that after entry and until final proof the entryman shall reside within such distance of the land entered as will enable him successfully to farm the same, as required by the statute.

You state that many persons who made such entries reside at remote distances from the land entered; that they are anxious to know whether the Department will place a liberal or a strict construction upon that portion of the law mentioned; and that they hesitate to improve the land until the Department shall have made a ruling or expressed itself in such a manner as will enable them to know whether they can meet the requirements of the law as to residence.

You express the opinion that some rule should be made if it can be satisfactorily formulated, and that a time limit would be preferable to a distance limit. You suggest that it would probably be reasonable and satisfactory to require entrymen to reside within such distance from the land entered as will enable them to reach their claims within twelve hours.

In the letter from the register of the local office at Salt Lake City it is stated that his office has never called in question the matter of residence of applicants under said section 6, and that it is not too much to say that 70 per cent of those who have made entry up to the present time are residents of cities and towns which are remote in distance from the lands entered, but, on the other hand, the lands are easily accessible by means of railroads; that there has been considerable discussion and many inquiries concerning the construction which the Department might finally place upon the law, and the register, after a careful consideration of the entire proposition, and having in mind the best results to be obtained from the operation of the law, is of the opinion that no limitation of distance should be applied to its operation, but if any limit as to residence is made it should be a time limit.

Section 6 of the act under consideration provides as follows:

That whenever the Secretary of the Interior shall find that any tracts of land in the State of Utah, subject to entry under this act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion,

designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this act without the necessity of residence: *Provided*, That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section.

In the regulations issued by the Department for the guidance of registers and receivers in the administration of this law it was stated that no attempt would be made at that time to determine how far from the land an entryman would be allowed to reside, as it was believed that a proper determination of that question would depend upon the circumstances of each case. (See 38 L. D., 364, 365.) The Department is unable to find in the language of the section any authority or justification for an arbitrary rule fixing a definite distance from the land within which such an entryman must reside or to fix a period of time within which he must be able to reach his claim; as it is believed, as stated in the regulations, that each case should be decided upon its own merits when actually presented to the Department upon final proof, protest, or contest through the regular official channels. However, I think it is proper to state that the entry provided for by this law is a homestead entry. It is so declared in the statute and the entryman is required to possess the qualifications of a homesteader, notwithstanding the fact that the entryman is excused from actually residing on the land entered. Nevertheless the law requires that he shall reside within such distance from it "as will enable him to successfully farm the same, as required by this section." It is believed that Congress used this language advisedly and that it was intended that the entryman himself should personally farm the land or personally supervise such farming. Otherwise, the use of the language employed by Congress has no meaning whatever.

Therefore, if an entryman personally farms the land entered or personally supervises the cultivation and improvement of the same, the Department will not inquire as to his place of residence, because the fact that he literally complies with the requirements of the statute will obviate the necessity of inquiry as to his place of abode.

If, on the other hand, an entryman does not personally farm the land or personally supervise the cultivation thereof, his place of residence respecting the distance from the land will be considered for the purpose of determining whether or not he is, by reason of his place of residence, unable to comply with the requirements of the law.

Respecting the case of Mr. Roberts, it may be stated that if, by reason of residing in the city of Salt Lake, he is not prevented from complying with the requirements of the statute as understood herein,



there would seem to be no reason why any objection should be offered to his place of residence. If, on the other hand, he is unable to comply with that provision of the law which requires him to successfully farm the land, and, as stated above, this means that he shall either personally do the work or personally supervise it, it will be necessary either for him to relinquish his claim or to change his place of residence.

#### RAILROAD GRANT—CHARACTER OF LAND.

##### OREGON AND CALIFORNIA R. R. Co. v. PUCKETT.

An adjudication by the land department that a tract of land within a railroad grant is mineral in character is not effective to except it from the grant in the face of a subsequent adjudication, as result of a hearing, that the tract is not and never was mineral in character; and having passed to the company under the grant, the land department is without authority to make other disposition thereof.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, August 31, 1910.* (S. W. W.)

This is the appeal of the Oregon and California Railroad Company from your office decision of May 19, 1910, holding that said company is not entitled under its grant to the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 28 S., R. 4 W., Roseburg, Oregon, land district, and that Charles W. Puckett should be allowed to make homestead entry for the same.

It appears from the record and your said decision that the land in question was listed by the Oregon and California Railroad Company May 15, 1890, as within the 20 miles or primary limits of its grant made by the act of July 25, 1866 (14 Stat., 239); that this tract was published by the company as within 6 miles of a mining claim of record. Protests were filed against the company's listing, upon which a hearing was ordered by your office letter "N" of July 23, 1896, in the case of S. R. Williams *et al.* v. Oregon and California Railroad Company; that the parties appeared and gave testimony, upon consideration of which the local officers found that this tract contained mineral in paying quantities and was more valuable for mineral than agricultural purposes; that notice of the decision was given to all parties in interest, and no appeal having been taken from the decision of the local officers, your office found, upon a review of the record, that no reason existed for disturbing the decision of the register and receiver and the same was accordingly concurred in, and the company's listing canceled by your office letter "N" of April 23, 1897.

It further appears that on January 2, 1909, Charles W. Puckett filed a homestead application for this tract, which was suspended

pending a hearing to be had to determine the character of the land, Puckett having alleged it to be nonmineral; that notice of a hearing was issued, at which Puckett appeared with witnesses and offered testimony, from which the local officers found the land to be nonmineral in character and so held in a decision dated December 17, 1909; that no appeal was filed and your office, upon reviewing the record, by decision of March 23, 1910, affirmed the action of the local officers holding the land to be nonmineral in character and returned Puckett's homestead application for appropriate action.

It appears, however, that in the meantime, on January 14, 1910, the Oregon and California Railroad Company filed in the local office its protest against the allowance of Puckett's homestead application, upon the ground that the land was nonmineral and lay wholly within the primary limits of the company's grant, by reason of which title to the same vested in the company as of the date of the grant, and that therefore the United States land department had no right or authority to receive or accept a homestead application for the same.

The register and receiver rejected the company's protest, stating that a hearing was not necessary to determine the truth or falsity of the allegations made by the company; that the records plainly showed that the land involved was within the primary limits of the company's grant and was adjudged to be mineral land in 1897, and that should your office find the land to be not mineral it would determine whether or not the same would revert to the railroad company or be subject to entry by Puckett. As above stated, your office decision of May 19, 1910, holds that the adjudication of April 23, 1897, determined the character of the land to be mineral and therefore excepted it from the operation of the company's grant.

It is suggested in your office decision that inasmuch as the testimony taken at the first hearing showed that the alleged mineral was placer in character, it may be that the deposits have been worked out since the date of the original hearing, and that the tract is therefore more valuable at present for agricultural than for mineral purposes, and inasmuch as the company has for a long series of years acquiesced in the ruling of April 23, 1897, without making any attempt to secure a revocation or modification thereof, it will not now be permitted to step in and avail itself of the benefits of the improvements made by Puckett on the tract and the expense incurred by him in establishing the nonmineral character of the land.

It is urged in the appeal that if the land be, as found by your office, nonmineral in character, it was not excepted from the company's grant, and that the Department has no authority to make any other disposition of it than to patent it to the company.

After careful consideration, the Department is of the opinion that there is much force in the company's contention. It is true that the land was found to be mineral land, as result of a hearing had in 1896, and while the company acquiesced in that finding, it is nowhere alleged that it relinquished any claim it might have to the land by seeking to make an indemnity selection in lieu of the same. If in fact the land was never valuable for mineral, as seems to be clearly shown from the testimony introduced by Puckett, it is not believed that this Department has any authority to issue a patent to the land to anyone other than the railroad company, because by the location and construction of its road the company acquired an indefeasible right to a patent for all land within the primary limits and not within the exceptions of the granting act. After the readjudication holding the land to be nonmineral, upon a record which shows that the land has never been mined, the company will not be permitted to take indemnity, and to now deny its title to the tract in place would entirely defeat the grant. This the Department can not lawfully do.

In the case of *Barnstetter v. Central Pacific Railroad Co. et al.* (21 L. D., 464), it was held that a hearing had as to the agricultural or mineral character of a number of tracts of land claimed under the railroad grant, and a judgment thereon that each specific tract included therein is in fact agricultural land, will not preclude a subsequent inquiry as to the character of said tract on the protest of a mineral claimant prior to the issuance of patent therefor if the showing made is clear and convincing. In that case the land was, after proper hearing, adjudicated to be nonmineral, and the railroad company upon that adjudication sold the same. Upon the subsequent application of mineral claimants for a second hearing to determine the character of the land, the purchaser from the company intervened, resting upon the principle of *res judicata*, but his contention was overruled by the Department. It is believed that the converse of the proposition announced in that case is equally sound and applicable here. True, Puckett has borne the expense of establishing the nonmineral character of this land, and it is believed that he should not have been allowed to do that without being told that in the event he was successful he could not be allowed to enter the land, because, if nonmineral, it passed to the railroad company. It may be that even in that event he would have insisted upon a hearing, because it is possible he may make some satisfactory arrangement for the purchase of the land from the company.

The entire matter considered, the Department holds that this tract of land, which is now shown not only to be not mineral at this time, but which, as above stated, the evidence submitted at the last hearing shows has never been mined, passed to the company under its grant, and the action of your office is accordingly reversed.

**SURPLUS SPOKANE LANDS CLASSIFIED AS TIMBER LANDS UNDER SECTION 2, ACT OF MAY 29, 1908.****INSTRUCTIONS.**

Surplus lands in the Spokane Indian reservation classified as timber lands under the provisions of section 2 of the act of May 29 1908, are not subject to location and entry under the mining laws.

*First Assistant Secretary Pierce to the Commissioner of Indian Affairs, August 31, 1910.* (F. W. C.) (F. H. B.)

In the matter of allotments, etc., Spokane Indian Reservation, in the State of Washington, your office, by letter of April 26, 1910, submitted a question as to the existence of authority for mining locations and entries upon the "timber lands" within that area.

The question arises from the following provisions, which are cited by your office:

The first, from the appropriation act of May 27, 1902 (32 Stat., 245, 266), is—

That the mineral lands only in the Spokane Indian Reservation, in the State of Washington, shall be subject to entry under the laws of the United States in relation to the entry of mineral lands: *Provided*, That lands allotted to the Indians or used by the Government for any purpose or by any school shall not be subject to entry under this provision.

A joint resolution (No. 25) of the same date (32 Stat., 742) enacted that that provision should not take effect and be operative until December 31, 1902.

A further provision is found in the joint resolution (No. 31) of June 19, 1902 (32 Stat., 744), whereby—

The Secretary of the Interior is directed to make allotments in severalty to the Indians of the Spokane Indian Reservation in the State of Washington, and upon the completion of such allotments the President shall by proclamation give public notice thereof, whereupon the lands in said reservation not allotted to Indians or used or reserved by the Government, or occupied for school purposes, shall be opened to exploration, location, occupation, and purchase under the mining laws.

These enactments were supplemented by the act of May 29, 1908 (35 Stat., 458), in the first, second, and fifth sections of which the following pertinent provisions appear:

That the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on the Spokane Indian Reservation and who have not heretofore received allotments.

That upon the completion of said allotments to said Indians the Secretary of the Interior shall classify the surplus lands as agricultural and timber lands, the agricultural lands to be opened to settlement and entry under the provisions of the homestead laws by proclamation of the President, which shall prescribe

the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation.

\* \* \* \* \*  
That the lands so classified as timber lands shall remain Indian lands subject to the supervision of the Secretary of the Interior until further action by Congress.

It is to be observed that the act first above cited and quoted, by which the original provision for the extension of the mining laws to the area in question was made, also contains a proviso which excludes from the operation of those laws the lands to be allotted to the Indians or used by the Government or any school; and within the time to which those provisions were by the joint resolution of the same date postponed, it was by the further joint resolution of June 19, 1902, *supra*, expressly provided that upon the completion of such allotments the President should make public proclamation thereof—

whereupon the lands in said reservation not allotted to Indians or used or reserved by the Government, or occupied for school purposes, shall be opened to exploration, location, occupation, and purchase under the mining laws.

It is also to be observed that the provisions of the first and second sections of the act of 1908 modified the corresponding provisions of the joint resolution of June 19, 1902, by the imposition of the additional duty of classifying the "surplus lands," upon completion of the allotments, "as agricultural and timber lands," the "agricultural lands" to be opened to homestead entry by Presidential proclamation and exclusively in accordance with its terms. And by the fifth section it is particularly enjoined that "the lands so classified as timber lands shall remain Indian lands, subject to the supervision of the Secretary of the Interior, until further action by Congress," etc.

Whilst the President's proclamation of May 22, 1909 (37 L. D., 698), which opened the "agricultural" (of the "surplus") lands to homestead entry and detailed the procedure by which it should be accomplished, might also be considered a proclamation of the completion of the allotments, within the purview of the joint resolution of June 19, 1902, as necessarily preceding the classification, etc., the decisive feature, in answer to the question submitted by your office, is deemed by the Department to be that by the specific enactment in the fifth section of the act of 1908, whereby "the lands so classified as timber lands shall remain Indian lands . . . until further action by Congress," those lands have been in fact and effect "reserved by the Government" within the meaning of the joint resolution last above mentioned.

In the absence of further and appropriate legislation, therefore, in the opinion of the Department, mining locations and entries upon the timber lands in question may not be made or allowed.

**SCHOOL INDEMNITY SELECTION—CERTIFICATE OF NONSALE AND NON-ENCUMBRANCE.****STATE OF CALIFORNIA.**

The State will in all cases be required to file a certificate of nonsale and nonencumbrance of land designated as base for school indemnity selections, regardless of whether the land has or has not been surveyed.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, August 31, 1910.* (E. F. B.)

The State of California has appealed from the decision of your office of May 7, 1910, requiring it to file certificate of nonsale and nonencumbrance of the land designated by the State as a base for its selection of the NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 20, N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 21, T. 20 S., R. 10 E., M. D. M., as indemnity for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 16, T. 13 S., R. 37 E., M. D. M., unsurveyed, within the Sierra National Forest. It was notified that upon failure to file said certificate the selection will be canceled.

The State alleges that it was error to require said certificate for the reason that the lands are unsurveyed and "therefore there could have been no sale or encumbrance of title by the State."

The requirement that the State shall in every case furnish a certificate that the lands it desires to exchange for other lands has not been sold or encumbered is a reasonable regulation for the protection of the Government and should be required in every case, whether the land has or has not been surveyed.

Your decision is affirmed.

**RAILROAD RIGHT OF WAY—POWER SITES—ACT OF MARCH 2, 1899.****BIG HORN RAILROAD CO.**

Under authority conferred upon the Secretary of the Interior by the act of March 2, 1899, to make all needful rules and regulations for the proper execution and carrying into effect of the provisions of that act, the department has the right to make reasonable requirements of an applicant for right of way under the act, such as requiring a stipulation that it will keep the right of way free from inflammable materials, will take precautions against fire, pay damages caused by fire, permit the United States to cross the right of way with telegraph and telephone lines, roadways, ditches, canals, etc.

Where right of way over lands in an Indian reservation is sought under the act of March 2, 1899, examination should be made to ascertain whether the lands over which the right of way passes are so situated with reference to water courses susceptible of power development as to justify use of the land for power purposes, and if use for such purpose be found necessary, it should be ascertained whether the right of way as located, both as to alignment and grade, will interfere with development of power; and, if so,

applicant should be advised and required to change its line, provided it can be so located as not to interfere with use of the land for power purposes; and, in case the lands have been withdrawn for power purposes, appropriate recommendation made to the President, to the end that the application be approved; and, should applicant refuse to make such change, the application should be rejected.

*First Assistant Secretary Pierce to the Commissioner of Indian Affairs, September 3, 1910.* (F. W. C.) (S. W. W.)

The department has considered your office letter of August 13, 1910, asking whether, in view of the opinion of the Assistant Attorney-General of June 14, 1910, the Big Horn Railroad Company, which has applied for a right of way across sections 16 and 21, township 5 north, range 6 east, Wind River meridian, Wyoming, said land being the allotment of Alta Hanway, a minor Arapaho Indian, should be required to execute stipulation heretofore commanded by the department, to the effect that the company will move its tracks should they at any time interfere with the development of power.

Your office invites attention to the fact that the Assistant Attorney-General's opinion was rendered in connection with an application to secure right of way, under the provisions of the act of March 3, 1875 (18 Stat., 482), while the application of the Big Horn Railroad Company is filed under the provisions of the act of March 2, 1899 (30 Stat., 990), the latter act requiring that any company seeking a right of way thereunder "shall comply with the provisions of this act and such rules and regulations as may be prescribed thereunder."

It is further stated in your office letter that in disposing of applications for rights of way across Indian lands your office has for the past two or three years required each applicant to file a stipulation to the effect that it would keep the right of way free from all inflammable materials, take precautions against fire, pay for damages caused by fire, permit the United States to cross the right of way with telegraph and telephone lines, roadways, ditches, canals, etc., and to pay the cost of building and maintaining all special structures required at such crossings by the operations of the Reclamation Service or Indian Service; that these requirements have been deemed necessary to protect the interests of the Indian and the Government, as it has often occurred that the right of way was desired across lands on which the Government was constructing or had in contemplation the construction of an irrigation system; and that the power-site stipulation has also been required where circumstances warranted it.

In view of the opinion of the Assistant Attorney-General above mentioned, your office desires to be instructed as to whether or not the power-site stipulation or any of the other stipulations above mentioned should be required of the applicant company and others that

may contemplate the acquisition of rights of way across Indian lands and Indian reservations, under the act of 1899.

The Assistant Attorney-General's opinion had reference only to rights of way sought by railroad companies under the provisions of the act of March 3, 1875, and inasmuch as that act differs materially from the act of 1899, under which the present application arises, this case is not necessarily controlled by the opinion of the Assistant Attorney-General.

The act of 1899 authorizes the Secretary of the Interior to make all needful rules and regulations for the proper execution and carrying into effect of the provisions of the law, and under this authority it is believed that the department has a right to make any reasonable requirement of the company respecting the keeping of the right of way free of inflammable material, etc., and your office is accordingly authorized to exact such requirements which in the opinion of the department are wholly reasonable.

Respecting the power-site stipulation, however, your office should first ascertain whether or not the lands have been withdrawn by the President for power-site purposes; and, if so, an examination should be made for the purpose of ascertaining whether the lands over which the right of way passes are so situated with reference to water courses susceptible of power development of such magnitude as to justify the use of the land for that purpose, and if it be found that the use of such land is necessary for such purpose, it should be ascertained whether the right of way as located, both as to alignment and grade, will interfere with the development of power, in which event the applicant should be so advised, and required to change its line, provided it can be so located as not to interfere with the use of the land for power purposes. If the applicant should refuse to make such change, the application should be rejected.

If, however, it be found that the line can be so located as not to interfere with the use of the land for power purposes, appropriate recommendation should be made to the President, to the end that the application for right of way may be approved. See *Continental Tunnel Railway Company* (39 L. D., 86).

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AMIDON *v.* HEGDALE.

Motion for rereview of departmental decision of May 14, 1910, not reported, which was adhered to on review, July 28, 1910, 39 L. D., 131, denied by First Assistant Secretary Pierce, September 3, 1910.



## UNITED STATES MINERAL SURVEYOR—FOREST LIEU SELECTION—SECTION 452, R. S.

RICARD L. POWEL.

- A United States mineral surveyor's appointment is for no fixed period, and where made "during the pleasure of the surveyor-general for the time being" is not terminated by failure to renew bond at the expiration of four years, as required by the act of March 2, 1895.
- A forest lieu selection under the act of June 4, 1897, by a United States mineral surveyor is in violation of section 452, Revised Statutes, which prohibits persons connected with the public-land service from directly or indirectly purchasing or becoming interested in the purchase of public lands.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.)      *Land Office, September 8, 1910.*      (S. W. W.)

This case involves the validity of a lieu selection, made under the act of June 4, 1897 (30 Stat., 36), by an alleged deputy mineral surveyor of the United States, and is before the Department on the appeal of A. E. Powel, administrator of the estate of Ricard L. Powel, deceased, from your office decisions of February 14 and April 29, 1910, holding for cancellation his selection, No. 2381, presented January 5, 1900, for the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , sec. 34, T. 18 S., R. 9 W., Las Cruces, New Mexico, land district.

Your office decisions under consideration found that Ricard L. Powel at the time of making the entry was a United States mineral surveyor, and held that for that reason the selection was in violation of section 452 of the Revised Statutes. Inasmuch as it was contended by the appellant that the appointment of Ricard L. Powel was made for a limited time, and had expired at the time of his presentation of the selection in question, your office, under date of June 24, 1910, was requested to advise the Department as to whether or not it was noted on his appointment that the same expired June 26, 1899; second, whether after expiration of that date Powel was recognized and entitled to act until another or subsequent appointment was made; and third, whether his appointment as a mineral surveyor was existing and recognized by your office January 5, 1900, when the selection was presented.

Under date of July 29, 1910, your office reported that the following bonds were executed by Powel:

Bond dated February 16, 1888, approved by office letter "E" of February 27;

Bond dated June 24, 1895, accepted by letter "E" of July 8;

Bond dated March 22, 1902, accepted by letter "N" of April 10; and

Bond dated March 16, 1906, accepted by letter "N" of April 6.

In addition to the above, your office inclosed copies of certain correspondence had with the surveyor-general of New Mexico, regarding the appointments of Mr. Powel, and also other correspondence relative to the office of surveyors-general.

The appeal charges error in holding that Powel was a deputy mineral surveyor at the time of his selection, and error in holding, even if it be held, technically, that he was a mineral surveyor at the time, that his act in making the selection comes within the intent of section 452 of the Revised Statutes.

It is shown that on March 5, 1898, Quinby Vance, United States surveyor-general for New Mexico, appointed Ricard L. Powel deputy mineral surveyor of the United States for the district of New Mexico, authorizing and empowering him "to execute and fulfill the duties of that office according to law, and to hold the said office, with all the rights and emoluments thereunto legally appertaining to him, the said Ricard L. Powel, during the pleasure of the surveyor-general of the United States for the district of New Mexico for the time being." At the bottom of the commission which issued to Powel under this appointment the following note appears: "Date of original appointment, February 18, 1888. This appointment and your bond expire June 26, 1899."

It is claimed in support of the appeal that the appointment was made by the surveyor-general "*for the time being*," and that it was stated on the face of the appointment that it expired on the 26th of June, 1899.

Inasmuch as no bond was given by Powel after the acceptance of his bond of June 24, 1895, until March 22, 1902, when his bond of that latter date was accepted by your office letter of April 10, 1902, it is claimed that during that period, from June 25, 1899, until the acceptance of the other bond in 1902, Powel was not a mineral surveyor, and that therefore he had a perfect right to make the selection in question.

Among the papers received with your office letter of July 29, 1910, is a copy of your letter of April 2, 1895, to the United States surveyor-general, Santa Fe, N. Mex., inviting his attention to the provisions of the legislative, executive, and judicial appropriation act of March 2, 1895, relative to official bonds, which provides, among other things, that every officer whose duty it is to take and approve bonds shall cause all such bonds to be renewed every four years after their dates. It will thus be seen that Powel's bond dated June 24, 1895, which was approved by the surveyor-general on June 26 of that year and forwarded to your office, was considered by the surveyor-general as expiring June 26, 1899, because under the provisions of the act of March 2, 1895, above mentioned, the surveyor-general was required to have all bonds renewed every four years. Consequently, when the

appointment of March 5, 1898, was made, at the bottom of which was noted that the original appointment was dated February 18, 1888, and that the appointment and bond both expired June 26, 1899, said note had reference not to the commisison on which it was noted, but to the original appointment of February 18, 1888.

Mineral surveyors were not appointed for any fixed period, as is claimed in the appeal, nor is there anything in the commission which issued to Powel March 5, 1898, which indicated that the same expired on June 26 of the following year or at any other time, but, as above indicated, a note was made on that appointment after the same had been executed by the surveyor-general, to the effect that his original appointment and the bond given thereon expired June 26, 1899. Powel was not appointed for the time being, as claimed in the appeal, but he was appointed to hold office during the will of the surveyor-general for the time being, such an appointment being tantamount to one for good behavior.

The foregoing satisfies the Department that Powel was unquestionably a duly authorized deputy mineral surveyor of the United States at the time of the presentation of the selection in question, and therefore it remains only to determine whether or not he is of the class prohibited by section 452 of the Revised Statutes from purchasing public lands directly or indirectly.

Respecting this last question it is sufficient to say that the Department has held that a United States mineral surveyor is within the purview of section 452 of the Revised Statutes (36 L. D., 61).

This is not a case where the entry was made inadvertently, as the record shows that Powel was dealing generally in the purchase of public lands by means of the location of scrip of various kinds. He is therefore clearly within the spirit of section 452 and also the regulations of the Department, which prohibit anyone connected with the public-land service from dealing in public lands of the United States in any manner whatever.

The action of your office is affirmed.

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AGRICULTURAL ENTRIES OF COAL LANDS—ACT OF JUNE 22, 1910.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, September 8, 1910.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

The following instructions are issued for your guidance in the administration of the act of Congress approved June 22, 1910 (36

Stat., 583), "An act to provide for agricultural entries on coal lands," a copy of which is appended hereto.

#### THE PURPOSE OF THE ACT.

1. This act was not designed to operate as an implied repeal of any provision of the act of March 3, 1909 (35 Stat., 844). There is no inconsistency between the two acts, and both of them may have harmonious operation within their proper spheres. The earlier law provides a remedy in those cases in which entries, locations, and selections have been or may be made for lands which, subsequently to entry, location, or selection, have been, or may be, claimed, classified, or reported as being valuable for coal, while the later act permits dispositions (therein named) to be made of lands valuable for coal, notwithstanding that they may have been previously withdrawn, or classified as such. The proviso to section 1 of the later act also affords relief to those persons who, prior to June 22, 1910, in good faith made entries, locations, or selections of lands which, at the date of such entries, locations, or selections, had been withdrawn or classified, as valuable for coal.

#### LANDS TO WHICH THE ACT IS APPLICABLE.

2. The act applies to unreserved public lands of the United States in those States and Territories in which the coal-land laws are applicable, exclusive of the District of Alaska, which have been withdrawn from coal entry and not released therefrom, or which have been classified as coal lands or which are valuable for coal, though not withdrawn or classified. It does not change, repeal, or modify agreements or treaties made with Indian tribes for the disposition of their lands, or apply to lands ceded to the United States to be disposed of for the benefit of such tribes.

#### CLASSES OF ENTRIES.

3. Original entries made under the provisions of the act or validated and confirmed thereby.

(a) Section 1 of the act provides that from and after its passage, the unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws, by actual settlers only, the desert-land law, selection under section 4 of the act approved August 18, 1894, known as the Carey Act, and to withdrawal under the act approved June 17, 1902, known as the reclamation act, whenever such entries, selections, or withdrawals shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of

the right to prospect for, mine, and remove the same; but that no desert-land entry made under the provisions of this act shall contain more than 160 acres, and that all homestead entries made thereunder shall be subject to the conditions, as to residence and cultivation, of entries provided for under the act approved February 19, 1909, entitled "An act to provide for an enlarged homestead."

Section 2 of the act provides that any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section 4 of the act of August 18, 1894, known as the Carey Act, and the Secretary of the Interior in withdrawing under the reclamation act lands classified as coal lands, or valuable for coal, with a view to securing or passing title to the same in accordance with the provisions of said acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions of this act.

With reference to homestead entries made under the provisions of this act, attention is called to the fact that the said act of February 19, 1909 (subject to which, as to residence and cultivation, such homestead entries must be made), provides that "no entry made under this act shall be commuted" (35 Stat., 639). This, then, requires a residence for the full period of five years to entitle the homesteader to patent thereunder. The latter act also provides that in addition to the proofs and affidavits required under section 2291 of the Revised Statutes the entryman shall prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops, other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

(b) Non-mineral entries, selections, or locations initiated prior to the passage of the act.

In the proviso to section 1 it is enacted that those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands, may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

Upon receipt of these instructions, registers and receivers will promptly advise, by registered mail, all those who have initiated non-mineral entries, selections, or locations, prior to the passage of this act, on lands withdrawn or classified as coal lands prior to entry, selection, or location, which have not been restored to entry under the general land laws, that they may perfect such non-mineral entries, selections, or locations (if made in good faith) under the provisions

of the laws under which said entries were made, but shall receive the limited patent provided for in this act, unless the lands are restored to entry under the general land laws prior to final action upon such entries, selections, or locations, or unless, within thirty days from receipt of such notice, in cases where final proofs have been made, or prior to final proof where such proofs have not been submitted, they submit evidence, preferably the sworn statements of experts or practical miners, that the land is, in fact, not coal in character, together with an application for classification, if the land is merely withdrawn, or for reclassification if classified as coal land. [See form for notice, p. 187.] The application and evidence will be by you transmitted to this office and follow the procedure prescribed in section 5, paragraph 2, of these instructions.

#### NOTICE TO CHIEF OF FIELD DIVISION.

4. Nothing herein shall change the procedure of forwarding to the proper Chief of Field Division and the proper officers in charge of the national forest (if in such a forest) a copy of all applications to make final proof, final entry, or to purchase public lands, for the indorsement of "protest" or "no protest," as provided for in the circular of April 24, 1907, paragraph 5 *et seq.*, except that where the only charge against the same in the office of the Chief of Field Division is that the land is coal in character, it will be unnecessary for him to protest same or make investigation, in view of the provisions of the act.

#### HEARING TO DISPROVE CLASSIFICATION.

5. The last proviso to section 3 of the act provides that nothing in the act contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Except in the case of those who present applications under section 2 of the act, you will advise any person presenting a *non-mineral* application or filing for lands *classified* as coal lands that he will be allowed thirty days in which to submit evidence, preferably the sworn statements of experts or practical miners, that the land is in fact not coal in character, together with an application that the same be reclassified, and that in the event of failure to furnish said evidence within the time specified the application will be rejected. Such applications will be given proper serial numbers and notation thereof made upon the records, and when accompanied by the necessary evidence they will be forwarded to the General Land

Office for action, where, if upon the showing made, and such other inquiry as may be deemed proper, the land is classified as agricultural land, the non-mineral application, in the absence of other objections, will be returned for allowance. If reclassification be denied, the applicant may, within thirty days from receipt of notice, apply for a hearing, at which he may be afforded an opportunity for showing that the classification is improper, in which event he must assume the burden of proof. If he should fail to apply for a hearing within the time allowed, his application to enter or file will be finally rejected. The rejection of such application, however, does not preclude the person from filing another application pursuant to section 2 of the act.

#### DISPOSAL OF COAL DEPOSITS.

6. *Right to prospect for coal—Bond to be filed.*—By section 3 of the act it is provided that upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the land so patented, together with the right to prospect for, mine, and remove the same; and that the coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Said section 3 also provides that any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this act, for the purpose of prospecting for coal thereon upon the approval of the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting; and that any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages.

As a condition precedent to the exercise of the right mentioned in this act to prospect for coal, the person desiring so to prospect must file in the office of the Commissioner of the General Land Office, for submission to the Secretary of the Interior for his approval, a bond or undertaking to indemnify the non-mineral claimant in lawful pos-

session under this act from all damages that may accrue to the latter's crops and improvements on such lands by reason of such prospecting, the right to prospect to date from receipt of notice of approval of the bond. There must be filed with such bond evidence of service of a copy thereof upon the non-mineral claimant. The bond must be executed by the prospector as principal, with two competent sureties or a bond company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), as amended by the act approved March 23, 1910 (36 Stat., 241), in the sum of \$1,000, as per form hereto annexed. Coal declaratory statements for and applications to purchase the coal deposits in lands entered, selected, or withdrawn under the reclamation act, as provided in section 2 of act, will be received and filed at any time after such entry or selection has been received and allowed of record or such withdrawal has become a matter of record in your office; coal declaratory statements for and applications to purchase the coal deposits in those lands embraced in non-mineral entries, selections, or locations made in good faith, described in, and protected by, the proviso in section 1 of the act, will be accepted and filed after it shall have been determined and become a matter of record in your office that such non-mineral entryman, selector, or locator shall receive the limited patent prescribed in the act: *Provided always*, That such lands, or the coal deposits therein, have then been restored to disposition under the coal-land laws and the regulations in force.

#### APPLICATIONS, CERTIFICATES, AND PATENTS.

7. (a) Entries and selections under the provisions of this act must have noted across the face of the application for entry or selection, before such application for entry or selection is signed by the applicant and presented to you, the following:

Application made in accordance with and subject to the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

Like notation will be made by receivers across the face of the notice of allowance (Form 4-279) issued on applications to enter or select lands under the provisions of this act.

The Secretary of the Interior in withdrawing, under the reclamation act, lands classified as coal lands, or valuable for coal, with a view to securing or passing title to the same in accordance with the provisions of said acts, will state in the notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of the act of June 22, 1910, *supra*.

(b) You will cause to be stamped on the final certificates issued to non-mineral claimants under this act—

Patent to contain provisions, reservations, conditions, and limitations of act of June 22, 1910 (36 Stat., 583).



There will be incorporated in patents issued to non-mineral claimants under this act the following:

Excepting and reserving, however, to the United States all the coal in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove the coal from the same upon compliance with the conditions and subject to the provisions and limitations of the act of June 22, 1910 (36 Stat., 583).

Immediately upon the notation upon your records of the filing and allowance of an entry, Carey Act selection, or a reclamation withdrawal under section 2 of the act, and upon the ascertainment (which will be noted of record) that the non-mineral entryman, selector, or locator mentioned in and protected by the proviso in section 1 of the act shall receive the limited patent prescribed therein, you will stamp on the tract book, on the same line with the entry and as near the descriptions as practicable, "Coal reserved to the United States, act of June 22, 1910." You will also write on the margin of the plat, under the heading "Coal reserved to the United States, act of June 22, 1910," the description of the land in which the coal deposit has been reserved.

(c) Coal declaratory statements, applications to purchase, certificates, and patents issued under the provisions of this act will describe the coal within legal subdivisions, and payment will be made at the price fixed for the whole acreage. Coal declaratory statements and applications to purchase under sections 2347-2352, Revised Statutes, for coal deposits disposable under this act, must have noted across the face of same, before such coal declaratory statements or applications to purchase are signed by the coal claimants and presented to you, the words—

Patent will convey only the coal in the land and rights incident thereto in accordance with the conditions and limitations of the act of June 22, 1910 (36 Stat., 583).

You will make like notation on each coal entry final certificate and notice of allowance issued by you for coal deposits disposable under this act.

There will be incorporated in patents to coal claimants for coal deposits disposed of under this act substantially the following words:

Now know ye, that there is, therefore, pursuant to the law aforesaid, hereby granted by the United States unto the said grantee and to the heirs or successors and assigns of said grantee all the coal and the coal deposits in the land above described, together with the right to prospect for, mine, and remove the coal from the same upon compliance with the conditions of and subject to the limitations of the act of June 22, 1910 (36 Stat., 583), entitled "An act to provide for agricultural entries on coal lands."

Protests, contests, appeals, and other proceedings arising under these regulations and the act shall be allowed and disposed of in accordance with the Rules of Practice.

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary.*

FORM OF BOND.

[Approved by Department, September 8, 1910.]

(Under act of June 22, 1910, 36 Stat., 583.)

KNOW ALL MEN BY THESE PRESENTS, That I \_\_\_\_\_ of \_\_\_\_\_ (or we \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_, as the case may be), a citizen (or citizens) of the United States, or having declared my (or our) intention to become a citizen (or citizens) of the United States, and never having held or purchased lands from the United States under the coal-land laws, either as an individual or as a member of an association, as principal (or principals), and \_\_\_\_\_ of \_\_\_\_\_, and \_\_\_\_\_ of \_\_\_\_\_, as sureties, are held and firmly bound unto \_\_\_\_\_, his heirs, executors, administrators, or assigns, in the full sum of one thousand dollars (\$1,000), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this \_\_\_\_\_ day of \_\_\_\_\_ 191—.

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas the above bounden \_\_\_\_\_ is desirous of entering upon the \_\_\_\_\_, section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, land district \_\_\_\_\_, for the purpose of prospecting for coal thereon under the provisions of the act of June 22, 1910 (36 Stat., 583); and, whereas, the above-named \_\_\_\_\_ is the lawful claimant of said land,

NOW THEREFORE, if the said above bounden parties, or either of them, or the heirs of either of them, their executors or administrators, upon demand, shall make good and sufficient recompense, satisfaction, and payment unto the said claimant, his heirs, executors or administrators, or assigns, for all such damages to the crops and improvements on said lands as the said claimant, his heirs, executors, administrators, or assigns shall suffer or sustain by reason of his, the above bounden principal's, prospecting for coal on said described land, then this obligation shall be null and void; otherwise the same shall remain in full force and effect.

\_\_\_\_\_  
*Principal.*

Residence \_\_\_\_\_

Signed and sealed in the presence of  
and witnessed by the undersigned:

\_\_\_\_\_  
*Surety.*

Residence \_\_\_\_\_

Residence \_\_\_\_\_

\_\_\_\_\_  
*Surety.*

Residence \_\_\_\_\_

Residence \_\_\_\_\_

## NOTICE TO NONMINERAL CLAIMANTS.

[Form approved September 19, 1910.]

(Act of June 22, 1910; 36 Stat., 583.)

No. —.

UNITED STATES LAND OFFICE, ———, ———,  
————, 191—.

SIR: You are hereby notified that the land embraced in your entry, selection, or location,<sup>a</sup> Number ———, made ———, 191—, under the ——— laws, for ——— [Describe by proper legal subdivisions], Section ———, Township ———, Range ———, ——— Meridian, was withdrawn ———, 191—, by departmental order of ———, 191—, executive order of ———, 191—, and classified ———, 191—, as coal land,<sup>a</sup> and therefore is not subject to disposition under your said entry, selection, or location, except under the provisions of the act of June 22, 1910 (36 Stat., 583), specially excepting and reserving to the United States all the coal in said land and the right to prospect for, mine, and remove the same, upon compliance with the conditions prescribed by said act.

If however you have good and sufficient reasons for believing that the land is not coal in character, you will be allowed—thirty days from notice hereof—at any time prior to the submission of final proof,<sup>a</sup> within which to submit evidence, preferably the sworn statements of experts or practical miners, that the land is in fact noncoal in character, together with an application by you—for classification as noncoal—for reclassification.<sup>a</sup>

In the event of your failure to take action as aforesaid, and the land has not in the meantime been restored to entry under the general land laws, a patent will issue on your said entry, selection, or location, containing the following reservation, to wit:

Excepting and reserving, however, to the United States, all the coal in the land so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove the coal from the same upon compliance with the conditions and subject to the provisions and limitations of the act of June 22, 1910 (36 Stat., 583)—

provided you have complied in good faith with all the requirements of the law in such cases made and provided.

————, Register.  
————, Receiver.

NOTE.—Your attention is directed to the provisions of the act of June 22, 1910, copy of which is printed below.

## AN ACT TO PROVIDE FOR AGRICULTURAL ENTRIES ON COAL LANDS.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this Act unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or

<sup>a</sup> Register will strike out all inapplicable portions of blank to meet the facts in each particular case.

withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February nineteenth, nineteen hundred and nine, entitled "An Act to provide for an enlarged homestead:" *Provided*, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act.

SEC. 2. That any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act.

SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Approved, June 22, 1910 (36 Stat. L., 583).

**HOMESTEAD ENTRY—QUALIFICATIONS—OWNERSHIP OF LAND—PUBLIC ROAD.****JONES v. BRIGGS.**

One holding the fee subject to an easement for public road is not the proprietor of the area covered by the easement within the meaning of section 2289, Revised Statutes, and such area should be excluded in determining his qualifications to make homestead entry under that section.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 8, 1910.* (E. L. C.)

Zachariah H. Briggs has appealed from your office decision of May 12, 1910, in which you reverse the action of the local officers and hold for cancellation his homestead entry No. 30656, made October 9, 1907, for the SE.  $\frac{1}{4}$ , Sec. 34, T. 32 S., R. 30 W., Dodge City, Kansas, land district. February 29, 1908, Jones initiated contest against said entry, alleging that the entry was made for speculative purposes and that Briggs was disqualified to make entry by reason of his ownership of more than 160 acres of land at the time of making entry.

The entryman paid something over \$1,000 for a relinquishment of a former homestead. At the time of his marriage in 1880, defendant testified that he was entirely without means. His wife obtained some money from the sale of personal property belonging to her, with which she purchased a small house and lot in Wilcox, Missouri. About seven years thereafter her father gave her 40 acres of land situated in the State of Illinois, and shortly thereafter gave her an additional 40, making a total of 80 acres. This land was subsequently sold and other land purchased.

Through successive real estate transactions the capital of defendant and his wife was increased until they acquired the 380-acre tract mentioned in plaintiff's contest affidavit. At the time title was acquired to this tract no instructions were given the grantor and the same was conveyed to the defendant. It appears that all the other tracts formerly owned were conveyed to defendant's wife. Prior to making the entry in question and for the purpose of qualifying himself to make the same, defendant deeded the 380-acre tract to his wife. From the testimony submitted it is clear that the fund with which this tract was purchased belonged to defendant's wife, and it is believed that the transfer of the same to her was a *bona fide* transaction. It appears that on April 13, 1906, one Singer and wife deeded to the defendant the SW.  $\frac{1}{4}$  of Sec. 15, T. 32 S., R. 30 W., Meade County, Kansas, "except railway right of way," which is shown to contain 3 acres. On April 10, 1906, the same parties deeded to the defendant a number of town lots situated in Plains, Kansas, which aggregate in area a little over 4 acres. There are two public roads along two sides of the SW.  $\frac{1}{4}$  of Sec. 15, which take up about  $2\frac{1}{2}$

acres of said land. The only question presented for the consideration of the Department is as to whether or not the defendant is disqualified under section 2289, R. S., to make this entry by reason of proprietorship of more than 160 acres of land at the time of making said entry. The record shows that 3 acres of this land was deeded to the railway for right of way purposes, and you properly held that this should be deducted from the 160 acres. It is contended by appellant that the  $2\frac{1}{2}$  acres included in the public roads should also be deducted. Section 2289 provides:

Every person who is the head of a family . . . shall be entitled to enter one quarter section, or a less quantity, of unappropriated public lands; . . . but no person who is the proprietor of more than 160 acres of land in any State or Territory, shall acquire any right under the homestead law.

It has heretofore been held by the Department that the word "proprietor" did not necessarily mean one who held the absolute title to the land, and that one who has entered into a contract for the purchase of land, although not acquiring the legal title thereto, is nevertheless the proprietor thereof within the meaning of the statute.

While it is true, as stated in your decision, that a public road is an easement in which the fee to the land used still remains in the defendant, nevertheless it is an appropriation of that land to the exclusion of the owner of the fee title except as he is permitted to use it in connection with and for the same purpose as the public generally. There is a distinction between the words "owner" and "proprietor," and it has been held that:

The ordinary meaning of the word "proprietor" is such that no person can hold that relation to property unless he has a personal interest in or right to it.

To be the proprietor of land within the meaning of section 2289, *supra*, one must have the exclusive right to the appropriation of the same for his own beneficial use. While the title in fee to the land embraced in the public road was in the defendant, he had no right to the appropriation of the same to his own use, and could not in any way exercise control or supervision over the same, and any attempt on his part to appropriate it to his own use to the exclusion of the general public would subject him to a penalty therefor. The fact that if the public highway should for any reason be abandoned for a sufficient period of years the same would revert to him by reason of his ownership of the fee, is not material to the consideration of his proprietorship over the same, as this is a contingency which may never arise and had not arisen at the time he applied to make the entry.

It is the opinion of the Department that both the land included in the railroad right of way, amounting to 3 acres, and the land included in the public highway, amounting to  $2\frac{1}{2}$  acres, should be deducted

from the area of the SW.  $\frac{1}{4}$  of Sec. 15. This being done, the entryman did not own more than 160 acres of land at the time of making said entry. Your decision is accordingly reversed and these proceedings dismissed.

**REPAYMENT—TIMBER AND STONE APPLICATION—ACT OF MARCH 26, 1908.**

FRANK G. BELL.

Mere error of judgment on the part of a timber and stone applicant in swearing that the land applied for is more valuable for timber than for agricultural purposes and is unoccupied, no bad faith or attempt at fraud appearing, is not sufficient ground for refusing repayment of the purchase money under the act of March 26, 1908, upon rejection of the application by the Department based upon a finding that the land is agricultural in character.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 9, 1910.* (G. C. R.)

The Department, June 1, 1910, affirmed the action of your office denying repayment of the purchase money on the timber and stone application made by Frank G. Bell, August 1, 1907, for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 5, T. 24 N., R. 2 E., Marquette, Michigan. The application did not include the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of said section 5 as recited by your office, and followed by this Department.

The application was rejected because of the holding (1) that the applicant's statement that the land was chiefly valuable for its timber was untrue and (2) that it was also untrue that no one was residing on the land when the application was made; that by making these untruthful statements the applicant was guilty of fraud and that repayment was, therefore, unauthorized.

For the purposes of this decision, it seems necessary to set forth with some particularity the facts in the case.

One Peter Cook entered all of the NE.  $\frac{1}{4}$  of Sec. 5 on December 3, 1878. Cook's entry was later cancelled and on December 3, 1903, one Fred J. Wolfe made homestead entry for the land in question, together with the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of said section 5.

Movant herein, February 3, 1906, filed a contest against Wolfe's entry, alleging abandonment. Hearing was had March 20 of that year, resulting in the cancellation of Wolfe's entry. Exercising his preference right, Bell, movant herein, filed timber and stone application as aforesaid, August 1, 1907.

Proof was submitted on Bell's application November 6, 1907. The proof witnesses and claimant testified to the effect that the land was chiefly valuable for its timber. Witness McVey, in answer to question 4 as to improvements or occupancy of land, said: "A little shanty on

it; a well; about four acres cleared, partly grown up with second growth."

To the same question witness Brooks said: "It is not occupied. The only improvement is about four acres cleared and a little shanty."

Bell, the applicant, answered said question as follows: "It is not occupied. The only improvements of any kind are about four acres cleared and a little old shack building abandoned by Wolfe when he abandoned the land."

In his application Bell stated, July 29, 1907, that the land was then uninhabited except by a squatter whose shanty is on the east boundary line.

The money (\$205.60) was paid for the land (82.24 acres), and receipt therefor given, but certificate was withheld for reasons hereinafter stated.

If by making the statement above referred to claimant swore "falsely," the act under which he applied (June 3, 1878) provides that in addition to being subject to the "pains and penalties of perjury," he should likewise forfeit the money paid for the land.

The proof having been rejected, or such disposition thereof made as was equivalent to rejection, movant is entitled to repayment, unless it appears that he has been "guilty of fraud or attempted fraud" in connection with his application (act of March 26, 1908, 35 Stat., 48).

The proof was at first suspended for the reason that shortly prior to its submission Samuel J. Crowell filed application to make homestead entry thereof. Crowell's application was accompanied by the affidavit of one Hickey and three Warners, *viz.*, William E., Andrew J., and Roy E., stating the land was more valuable for farming purposes than for its timber. No reference was made by these witnesses as to Crowell's settlement on the land.

Hearing was duly had upon the issue thus raised. A large amount of testimony was taken by both parties. The register and receiver found that the land "was chiefly valuable for its timber" and subject to entry under the timber and stone act. They recommended that the land be passed to patent on Bell's showing.

On appeal, your office reversed the action of the register and receiver, holding that the claimed amount of timber (250,000 feet) indicated such "a sparseness of growth" that its utter worthlessness for agricultural purposes would have to be shown before it could be regarded as chiefly valuable for timber, citing *Anway v. Phinney* (19 L. D., 513). On further appeal, the Department, January 16, 1909, affirmed that action.

While the Department affirmed the action of your office holding that the land was more valuable for farming than for its timber, there was much testimony of a positive character showing the land was valueless for agricultural purposes.



The field notes of the public survey read into the record show that on the line between sections 4 and 5 (the land lies in section 5) "the land is rolling, soil poor and sandy." Nine witnesses, including the sheriff of the county, stated, in effect, that the land is valueless for farming purposes; that it was sandy and had no clay subsoil.

At the hearing, Allen E. Rose, aged 65 years, testified (page 93) he had often been over the land; that there was at least 250,000 feet of merchantable timber thereon, worth \$4.50 per thousand; that he examined the soil by digging holes therein and found "clean sand and nothing else;" that he saw no evidence of clay; that even the four or five acres cleared on the land was worth nothing for farming. This witness was then supervisor of the township and deputy state trespass agent. He had also held the positions of county treasurer and register and had been a member of the state legislature.

Other witnesses testifying to substantially the same were apparently of high character and standing, as is also movant herein.

When such witnesses make under oath the exact statements made by Bell in his application and proof, it cannot be reasonably held that Bell in making them was "guilty of fraud or attempted fraud."

Bell and all these eight other witnesses may have erred in judgment, and the Department has so held. But that error of judgment by no means justifies the holding that Bell was guilty of fraud or attempted fraud in stating the land was chiefly valuable for its timber.

It will be observed that in the beginning Wolfe and not Crowell was attacked by Bell. The latter had no thought that Crowell, a mere squatter, and sometimes a sojourner in Wolfe's abandoned house, was in the way, and so in his application Bell stated the land was not then occupied "except by a squatter."

It is true that in his proof Bell stated November 6, 1907, that the land was not then occupied. This statement was literally true; at least Crowell, according to his own statement, was away from the land in 1907—indeed admits he did not that year raise anything whatever on the land.

Bell was from first to last on the land, examining it, at least twelve times, and never saw Crowell there. Crowell had been married but was then single. He was often away from the land teaming and doing other work. His statement of the amount of cleared land, four acres, corresponds with that made by Bell.

Your office, it appears, received from the Honorable George A. Loud, information to the effect that Crowell, after the land was patented to him, sold the same for \$1,000.

Instigated by Mr. Loud, your office, June 15, 1910 (subsequent to action review of which is sought), ordered an investigation in connection with Bell's application for repayment. Bell in the motion

herein asks that the agent's report, when received, be considered in connection with the motion herein.

It does not appear that the agent has yet reported. Nor does it seem necessary to await that report. It is sufficient to say from the recitals herein that no certificate was ever issued on Bell's application; that he paid the money for the land; that the final proof was rejected; and that the record does not establish that he was guilty of fraud or attempted fraud—on the contrary, his statements at all times appear to have been honestly made; that while he may have erred in judgment as to the character of the land, such error of judgment by no means arises to the gravity of perjury or fraud, in the absence of which claimant is entitled to repayment.

The motion herein is allowed. Your office decision denying repayment is reversed and departmental decision of June 1, 1910, review of which is sought, is set aside and vacated. Repayment will be allowed.

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**SOLDIERS' ADDITIONAL-OWNERSHIP OF RIGHT-PROBATE PROCEEDINGS.**

THOMAS v. HOPKINS.

Where one claiming ownership of a soldiers' additional right by virtue of purchase thereof at a sale by the administrator of the estate of the deceased soldier under probate proceedings locates the same, and another files protest against issuance of patent upon such location, claiming ownership of the right in himself through an alleged sale of the right by the soldier prior to his death, and furnishes evidence persuasive but not conclusive of his ownership, the Department will not issue patent upon the location until the protestant has been afforded opportunity to proceed directly in the court which granted letters of administration upon the soldier's estate and ordered sale of the right, with a view to having such proceedings set aside, or to furnish clear and convincing proof of the soldier's sale of the right prior to his death.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 9, 1910.* (S. W. W.)

This case involves the ownership of the soldiers' additional homestead right of Thomas C. Wilkerson, who served as a private in Company D, Eighth Regiment, Missouri Cavalry, from August 9, 1862, to July 20, 1865, and who made homestead entry, No. 4815, January 7, 1871, for the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 19, T. 30 N., R. 20 N., Springfield; Missouri, land district, containing 80 acres, and is before the Department on the appeal of Ammi A. Thomas from your office decision of June 1, 1910, dismissing his protest, filed July 9, 1909, against the issuance of patent on the location of this right made by Louis J. Hopkins, assignee of the administrator of the

estate of the said Wilkerson, upon the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 24, T. 64 N., R. 12 W., Duluth, Minnesota, land district.

Hopkins bases his ownership of the right upon a sale made by the administrator of the estate of the deceased soldier under probate proceedings had in Greene County, Missouri, in the year 1904. The order of the probate court was based upon the verified petition of Mrs. A. C. Lister, the daughter and one of seven heirs of the soldier, it being alleged in the petition that the soldier made the original entry above described and also an additional entry at Washington, D. C., for 40 acres of land in the former Springfield, Illinois, land district, described as the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 29, T. 37 N., R. 15 E. Upon this verified petition the probate court ordered the administrator to sell the right at private sale to Nelson W. Ward; and the latter transferred the right to Hopkins July 7, 1904.

The protestant, Thomas, bases his claim to the right upon an alleged sale made by the soldier December 16, 1874, to C. D. Gilmore, who, it is alleged, subsequently sold this right, together with other scrip claims located on Wolf Lake, Illinois, to the protestant.

In support of the protestant's claim is an original letter dated at Springfield, Missouri, December 30, 1874, signed by D. O. Crane, and addressed to C. D. Gilmore at Little Rock, Arkansas, purporting to inclose the additional homestead right of Thomas C. Wilkerson for 80 acres; also the protestant's affidavit dated July 30, 1910, in which he swears that for many years he was intimately acquainted with D. O. Crane, who wrote the above-mentioned letter to Gilmore in 1874; that he has personal knowledge of the fact that Crane was at that time employed by Gilmore to purchase for the latter soldiers' additional homestead rights; and that in the year 1879 he (Thomas) purchased from Gilmore, for the sum of \$2,000, all of Gilmore's right, title, and interest in certain soldiers' additional homestead rights which had been located by him in the year 1875 on land which was a portion of the bed of Wolf Lake, "including the right of Thomas C. Wilkerson for 80 acres, which right I still own by virtue of said purchase."

As further evidence of a sale by the soldier in 1874, the protestant has filed a certified copy of a power of attorney executed by Thomas C. Wilkerson and his wife, Rachel C. Wilkerson, December 16, 1874, appointing one Marshal H. Parks their attorney to sell and convey the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 29, T. 39 N., R. 15 E., 3d P. M., being the same land which had been entered as a soldiers' additional homestead. The protestant has also filed certified copy of a deed executed by J. M. Roux, dated October 22, 1881, conveying the said NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 29, to Elizabeth P. Thomas. In this deed it is recited that Roux was substituted as attorney under the power granted Parks by the original power given by the soldier and his wife.

The records of your office show that Thomas C. Wilkerson, on January 14, 1875, made application at the Springfield, Illinois, land office to locate the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of said section 29 as an additional homestead, based on the Springfield, Missouri, entry, No. 4815, and that the entry was amended by eliminating the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , under the Commissioner's decision of February 12, 1878. It should be stated here that this amendment of the entry was made owing to the fact that there was a prior claim to the tract in conflict, and the right of the soldier to locate 80 acres of land was not at that time questioned. Moreover, the decision of the Commissioner of February 12, 1878, did not become final until after Thomas is alleged to have purchased all of Gilmore's right and interest in the locations made on the former bed of Wolf Lake.

It will thus be seen that Hopkins, who located 40 acres of this soldiers' additional right on the land above described in the Duluth, Minnesota, land district, bases his claim entirely upon the order of sale issued by the probate court of Greene County, Missouri, in the year 1904; while the protestant bases his claim upon the original letter written by Crane to Gilmore, purporting to inclose the right, and the protestant's affidavit that he purchased the right from Gilmore in 1879, together with the circumstances which tend to corroborate his claim of ownership.

At the time of the location of this right the Department held that the location of a portion of the right operated as a satisfaction of the entire right, consequently it is a fair presumption that if any portion of the right were purchased by Gilmore the entire right was purchased. Moreover, as above stated, an application was made to locate the entire right and this application was amended, not for any defect in the right, but merely because of a prior claim to a portion of the tract involved.

The power of attorney executed by the soldier and his wife authorizing Marshal H. Parks to sell the 40-acre tract for which the location was allowed and the subsequent sale of the tract to Elizabeth Thomas constitute in themselves no evidence of a sale of the right to Gilmore or anyone else, but inasmuch as the Department recognizes the fact that soldiers' additional rights were sold in this manner, this fact has been mentioned and given due consideration.

However, from the evidence submitted by the protestant the Department is not entirely satisfied that Wilkerson sold his additional right to Gilmore in 1874, and that Gilmore in turn transferred the same to the protestant in 1879, but it is believed that the evidence filed by the protestant constitutes sufficient notice to the Department to justify it in refusing to issue any patent on the location made by Hopkins until the protestant is afforded an opportunity of proceeding directly in the court which granted letters of administration on Wilker-

son's estate and ordered the sale of the right for the purpose of having those proceedings set aside; or the protestant may, if he can do so, file clear and convincing proof of the soldiers' sale of the right prior to his death.

It is noticed that this protest was not served on Hopkins and neither was he served with any copy of your office decision, dismissing the protest.

The decision of your office is modified accordingly. All parties in interest should be notified thereof.

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**RECLAMATION—FORMS FOR WATER-RIGHT CERTIFICATES AND FINAL AFFIDAVITS.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
*Washington, September 9, 1910.*

**THE COMMISSIONER OF THE GENERAL LAND OFFICE.**

SIR: Referring to your letters of January 25 and August 18, 1910, I have approved and transmit herewith the following forms for use in the administration of the United States reclamation act of June 17, 1902 (32 Stat., 388):

(1) Form of water-right certificate to be signed by the Secretary of the Interior and given to the water-right applicant upon submission of satisfactory proof of full compliance with the requirements of the reclamation act.

(2) Form of final affidavit, corroborated, to be submitted by the owner of private land reclaimed under the act of June 17, 1902, *supra*.

(3) Form of final affidavit, corroborated, to be submitted by homestead entryman under provisions of said act of June 17, 1902.

Very respectfully,

FRANK PIERCE, *Acting Secretary.*

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[Form approved by Department September 9, 1910.]

No. —

**WATER RIGHT CERTIFICATE.**

(Under Reclamation Act of June 17, 1902.)

**THE UNITED STATES OF AMERICA.**

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS it appears that in pursuance of the provisions of the act of Congress, approved June 17, 1902 (32 Stat., 388), and of the acts amendatory thereof or supplementary thereto, water-right application No. — has been

filed in the local land office at ——— by ———, in connection with the ——— Project, for the following described land: Farm Unit ———, or ———, Section ———, Township ———, Range ———, ——— P. M., containing ——— acres of irrigable land, and that full payment has been made of the building charge, and of all charges for operation and maintenance due to date and imposed by the public notices issued by the Secretary of the Interior under section 4 of said act,

NOW THEREFORE, be it known that in consideration of the foregoing and of the proof submitted showing compliance with the requirements of the acts of Congress applicable thereto, the right to the use of water has become appurtenant to the irrigable lands above specified, subject to the payment of the annual charges for operation and maintenance which have been or which may hereafter be assessed against such irrigable area.

IN TESTIMONY WHEREOF, this certificate has been issued, under my hand at the City of Washington the ——— day of ———, one thousand nine hundred and ———.

\_\_\_\_\_  
Secretary of the Interior.

[Form approved by Department September 9, 1910.]

\_\_\_\_— Project, \_\_\_\_\_.  
Water-Right Application No. \_\_\_\_\_.  
\_\_\_\_\_

#### FINAL AFFIDAVIT.

(Land in Private Ownership; Act of June 17, 1902.)

I, \_\_\_\_\_, having filed in the local land office at \_\_\_\_\_, \_\_\_\_\_, Water-Right Application No. \_\_\_\_\_, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat., 388), and the acts amendatory thereof or supplementary thereto, and the rules and regulations thereunder, embracing \_\_\_\_\_ acres of irrigable land within \_\_\_\_\_, Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, \_\_\_\_\_ P. M., \_\_\_\_\_, an area of \_\_\_\_\_ acres, as shown on the approved plat on file in the local land office, in order to perfect a right to the use of water appurtenant to said irrigated land by virtue of the aforesaid act of Congress, do solemnly swear (or affirm) that I am the owner in fee simple of the tract of land hereinbefore described, as duly shown in the records of \_\_\_\_\_ County, \_\_\_\_\_, and that my post office address is \_\_\_\_\_, \_\_\_\_\_; that I am a *bona fide* resident of the land (or occupant thereof residing in the neighborhood of such land, namely, at \_\_\_\_\_ in Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, \_\_\_\_\_ P. M., a distance in a direct line of \_\_\_\_\_ miles therefrom), having maintained such residence since the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, to the present time; that <sup>a</sup> \_\_\_\_\_; and that I have made full payment for the said area of irrigable land of the estimated building charge assessed against it in connection with this project, being \$\_\_\_\_\_, and all operation and maintenance charges due at this date.

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<sup>a</sup> Here state briefly compliance with the regulations of February 10, 1909, requiring that one-half of the irrigable area must be cleared and leveled, sufficient laterals constructed, land put in proper condition, watered, cultivated, and at least one satisfactory crop raised thereon.

STATE OF \_\_\_\_\_,

County of \_\_\_\_\_, ss:

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.] \_\_\_\_\_

My commission expires \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_ and \_\_\_\_\_, being duly sworn, depose and say that they have read the foregoing; that they are well acquainted with the affiant and the land described; and that to their personal knowledge know that the statements in regard to the residence upon or occupancy thereof and the reclamation of said land are true.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.] \_\_\_\_\_

[Form approved by Department September 9, 1910.]

\_\_\_\_\_ Project, \_\_\_\_\_.

Water-Right Application No. \_\_\_\_\_.

## FINAL AFFIDAVIT

(Homestead Entries; Act of June 17, 1902.)

I, \_\_\_\_\_, having filed in the \_\_\_\_\_ Land Office, \_\_\_\_\_, Water-Right Application No. \_\_\_\_\_ subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat., 388), and the acts amendatory thereof or supplementary thereto, and the rules and regulations established thereunder, covering \_\_\_\_\_ acres of irrigable land within the \_\_\_\_\_, Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, \_\_\_\_\_ Meridian, an area of \_\_\_\_\_ acres, as shown on the approved plat on file in the local land office, in order to perfect a right to the use of water appurtenant to said irrigable land by virtue of the aforesaid act of Congress, do solemnly swear (or affirm) that I have made homestead entry No. \_\_\_\_\_ for the tract of land hereinbefore described subject to the aforesaid acts of Congress, and have made the necessary final proof of residence, cultivation and improvement as required by the general homestead laws; that " \_\_\_\_\_; and that I have made full payment for the said area of irrigable land of the estimated building charge assessed against it in connection with this project, being \$\_\_\_\_\_, and all operation and maintenance charges due at this date.

STATE OF \_\_\_\_\_,

County of \_\_\_\_\_, ss:

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.] \_\_\_\_\_

My commission expires \_\_\_\_\_, \_\_\_\_\_.

<sup>a</sup> Here state briefly compliance with the regulations of February 10, 1909, requiring that one-half of the irrigable area must be cleared and leveled, sufficient laterals constructed, land put in proper condition, watered, cultivated and at least one satisfactory crop raised thereon.

\_\_\_\_\_ and \_\_\_\_\_, being duly sworn depose and say that they have read the foregoing; that they are well acquainted with the affiant and the land described; and to their personal knowledge know that the statements in regard to the reclamation of said land are true.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.  
[SEAL.] \_\_\_\_\_

NOTICE OF PROCEEDINGS AND DECISIONS IN CASES INVOLVING LANDS  
OR CLAIMS IN NATIONAL FORESTS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington September 12, 1910.*

THE SECRETARY OF AGRICULTURE,  
*Washington, D. C.*

SIR: Section 4 of joint regulations approved June 27, 1910 [39 L. D., 52], relating to hearings and appeals in cases involving lands or claims within National Forests, provides that notice of proceedings and decisions in cases covered by the regulations shall be given to "the proper law officers of the Department of Agriculture," and that they shall have the right to appeal from any decision by the Commissioner of the General Land Office and to file motion for review in the Department, or take other like action in the same manner as a private contestant.

This office would prefer not to receive or in any way deal with the records or decisions in such cases as may be passed upon by the General Land Office in advance of their transmission on appeal or motion by the law officers of the Department of Agriculture, and for this reason and in order to avoid delay, it is suggested that notice of action taken by or through the General Land Office in such cases be given by the General Land Office directly to the Solicitor, Department of Agriculture, so that the law officers of your Department may promptly determine what action, if any, they desire to take under the rules in cases so decided.

If this course meets with your approval, please concur hereon and the necessary directions will be given to the General Land Office.

Very respectfully,

FRANK PIERCE,  
*Acting Secretary of the Interior.*

SEPTEMBER 14, 1910.

I concur in the procedure suggested.

JAMES WILSON,  
*Secretary of Agriculture.*

PROPERTY OF THE  
GENERAL LAND OFFICE



**EFFECT OF WITHDRAWAL ON FINAL TIMBER ENTRY—JURISDICTION OF LAND DEPARTMENT.****CHARLES W. PELHAM.**

After full payment of the purchase price and the issuance of final certificate upon a timber and stone entry, the land department is without jurisdiction over the land except to determine whether it was subject to such entry at the date thereof and whether the entryman was qualified to make the entry and had in all respects complied with the law; and subsequent withdrawal of the land in anticipation of proposed legislation affecting the disposition of power sites is unauthorized and not sufficient ground for withholding patent upon the final certificate.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 12, 1910.* (E. F. B.)

This motion is filed by Charles W. Pelham for review of the decision of the Department of April 30, 1910, affirming the decision of your office refusing to relieve from suspension his timber and stone entry, for which application was made July 20, 1908, for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and lots 1, 2 and 9, sec. 18, T. 45 N., R. 4 E., B. M., Coeur d'Alene, Idaho, upon which final certificate issued May 29, 1909, after payment in full had been made, as required by law.

December 18, 1909, an order was issued withdrawing from all forms of disposal, settlement, or location certain lands and providing that all existing claims, filings and entries of any lands within said withdrawal shall be temporarily suspended. Said withdrawal was made in aid of proposed legislation affecting the disposition of water-power sites and embraced lot 9 and the land entered by appellant.

The withdrawal further provided that "all valid entries heretofore made may proceed up to and including the submission of final proof, but no purchase money will be received or final certificate of entry issued until further orders."

It does not appear that the land embraced in Pelham's entry was not subject to disposal at the date thereof, or that Pelham was not duly qualified to make entry of said land, or had not in every respect complied with the law under which his entry was allowed, nor was anything disclosed by the record affecting the validity of said entry or showing that the certificate was not properly issued. But it appears that you construed said order of withdrawal as affecting all entries of land, whether complete or incomplete, and you refused to relieve the entry in question from suspension and to issue patent thereon.

Irrespective of any question that may arise as to the authority of the Executive to make said withdrawal, there being at that time no legislative authority authorizing withdrawals of lands for such purpose, the entry in question, after the issuance of the final certificate, was not subject to the jurisdiction and control of your office, except

for the sole purpose of determining whether the land was subject to entry at the date thereof, or whether the entryman was qualified to make said entry and had in all respects complied with the law under which said entry was made and allowed. Such power of supervision, however, is not an unlimited and arbitrary power. It cannot be exercised to deprive a person of land lawfully entered and paid for. "By such entry and payment the purchaser secures a vested interest in the property and the right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property." *Cornelius v. Kessel* (128 U. S., 456, 461).

The order of withdrawal could only affect lands subject to the jurisdiction and control of your office, which would include all entries, claims, or filings where the entry, claim or filing had not been completed at the date of the withdrawal, and as to which no right had vested in the entryman or claimant. The jurisdiction of your office also extended to all claims or entries upon which final certificate had issued, but only for the purpose of determining whether the entry was valid and whether the final certificate had properly issued. If the entry was invalid from any cause whatever and was not entitled to approval, the land upon cancellation of the entry would *ipso facto* become subject to the operation of the withdrawal. But, if the land was subject to entry and the law under which the entry was made had in all respects been complied with and the entryman was qualified to purchase the land, the acceptance of the money and the issuance of the final receipt therefor placed it beyond the jurisdiction of your office or the authority of Congress to make any other disposition of the land. It ceased to be subject to disposition by the United States; it was not in equity their property. *Cornelius v. Kessel, supra*; *Carroll v. Stafford* (3 How., 440, 460); *Witherspoon v. Duncan* (4 Wall., 210, 218).

The decision of April 30, 1910, is recalled and vacated and the motion is granted. Unless you have reason to believe that said entry is invalid for any reason, you will relieve it from suspension and issue patent therefor.

#### RECLAMATION—ACTS OF JUNE 11, 23, AND 25, 1910.

##### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., September 13, 1910.

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: Section 5 of the act of Congress approved June 25, 1910, entitled "An act to authorize advances to the reclamation fund, and

for the issue and disposal of certificates of indebtedness in reimbursement therefor; and for other purposes" (Public, No. 289; 36 Stat., 835), provides:

That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same.

Under the provisions of this act, the settlement on or entry of lands reserved for irrigation purposes, commonly described as lands under the second form of withdrawal provided by the act of June 17, 1902 (32 Stat., 388), is prohibited and you are instructed and directed not to recognize any settlement on such lands made on or after June 25, 1910, nor to allow any entry thereof during the period of their withdrawal until approved farm unit plats therefor have been filed in your office and public notice has been issued in connection therewith fixing the water charges and the date when water can be applied. Existing entries are not affected by this act and where settlements have been effected, in good faith, prior to June 25, 1910, on lands embraced within second-form withdrawals, you are directed to allow persons showing such settlement to complete entry thereof in the manner and within the time provided by law.

The act approved June 25, 1910, entitled "An act granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two" (Public, No. 314; 36 Stat., 864), reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all qualified entrymen who have heretofore made *bona fide* entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the national irrigation act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided*, That the period of actual absence under this act shall not be deducted from the full time of residence required by law.

When homestead entrymen within irrigation projects file in your office applications for leave of absence under the provisions of this act, you will make proper notation of the same on your records, and forward the application together with your recommendation thereon to the General Land Office for action.

These applications for leave of absence should be in the form of an affidavit, duly corroborated by two witnesses, contain a specific description of the land, show the good faith of the applicant, and set forth in detail the character, extent and approximate value of the

improvements placed on the lands, which must be such as to satisfy the requirement of the law that the entryman has made substantial improvements, and must show, as a matter of fact, that water is not available for the irrigation thereof.

When sufficient showing is made in cases coming within the provisions of the law, leave of absence will be granted until such time as water for irrigation is turned into the main irrigation canals from which the land is to be irrigated or, in the event that the project is abandoned by the Government, until the date of notice of such abandonment and the restoration to the public domain of the lands embraced in the entry.

Attention is directed to the provision that "the period of actual absence shall not be deducted from the full time of residence required by law." The effect of the granting of leave of absence under this act is to protect the entry from contest for abandonment and, by the necessary implication of the act, the period of seven years within which the entryman is required to submit final five-year proof will be extended and the entry will not be subject to cancellation for failure to submit proof until seven years from the date of entry, exclusive of the period for which leave of absence may be granted.

The act approved June 23, 1910, entitled "An act providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead act." (Public, No. 243; 36 Stat., 592), reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.

Under the provisions of this act persons who have made or may make homestead entries subject to the reclamation act may assign their entries in their entirety at any time after filing in this office satisfactory proof of residence, improvements and cultivation for the five years required by the ordinary provisions of the homestead law. The act also provides for the assignment of homestead entries in part, but such assignments, if made prior to the establishment of farm

units, must be made in strict accordance with the legal subdivisions of the public survey, and if made after such units are established must conform thereto. Such assignments which shall be made expressly subject to the limitations, charges, terms and conditions of the reclamation act will be accepted by you, duly noted on your records and forwarded to this office in the usual manner, and the assignees in each case will be allowed to submit proof of reclamation and make payment of the water right charges as would the original entryman, and after full compliance with the law will be given final certificate and patent.

The act of Congress approved June 11, 1910, entitled: "An act providing for the reappraisal of unsold lots in the townsites on reclamation projects, and for other purposes." (Public, No. 206; 36 Stat., 465), provides:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within townsites on projects under the reclamation act heretofore or hereafter appraised under the provisions of the act approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," and the act approved June twenty-seventh, nineteen hundred and six, entitled "An act providing for the subdivision of lands entered under the reclamation act, and for other purposes;" and thereafter to proceed with the sale of such town lots in accordance with such acts.

SEC. 2. That in the sale of town lots under the provisions of the said acts of April sixteenth and June twenty-seventh, nineteen hundred and six, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of six per centum per annum on deferred payments.

In all cases where the Secretary of the Interior shall direct the reappraisal of unsold lots under the first section of the above quoted act the reappraisal will be conducted under the regulations provided for under the original appraisal of lots in townsites created under the laws in said act mentioned. The lots to be reappraised will not, from the date of the order therefor, be subject to disposal until offered at public sale at the reappraised value, which offering will be conducted under the regulations providing for the public sale of lots in such townsites. The lots so offered at public sale will then become subject to private sale at the reappraised price.

Whenever the Secretary of the Interior, in the exercise of the discretion conferred upon him by section 2 of said act, shall order the payment of the purchase price of lots, sold in town sites created under the laws in said act mentioned, to be made in annual installments, the same will be done under such regulations as may be issued in each particular instance.

All regulations or instructions in conflict with the acts above quoted or the instructions herein are hereby superseded.

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary of the Interior.*

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**ENLARGED HOMESTEAD—ADDITIONAL ENTRY—QUALIFICATIONS—SECTION 3, ACT OF FEBRUARY 19, 1909.**

**EITZEN v. MOORE.**

The right to make additional entry under section 3 of the enlarged homestead act of February 19, 1909, is determined by conditions existing at the time the right is attempted to be exercised and not at the date of the classification and designation of the land under that act; and where one qualified to make such entry at the time of the classification and designation of the land thereafter submits final proof upon his original entry, he thereby disqualifies himself to make entry under that section.

Directions given for the amendment of paragraph 5 of the circular of December 14, 1909, 38 L. D., 361, and the circular of July 18, 1910, 39 L. D., 96, to accord with the views herein expressed.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 14, 1910.* (W. L. C.)

This is an appeal by John A. Eitzen from your office decision of June 28, 1910, affirming the action of the local officers and rejecting his contest affidavit filed May 27, 1910, against the homestead entry made February 23, 1910, by John A. Moore under the act of February 19, 1909 (35 Stat., 639), for the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 10 N., R. 30 E., Tucumcari, New Mexico, land district, as additional to his original homestead entry made January 29, 1903, for the SW.  $\frac{1}{4}$ , Sec. 26, same township and range, on which final proof was made and certificate issued December 28, 1909; said contest affidavit being rejected for the assigned reason that it "does not set forth a sufficient cause of action."

Said affidavit sets forth that the entryman was not eligible for an additional entry under said act because he had made final proof under his original entry prior to application under said act.

Your decision holds that said Moore was qualified to make such additional entry under said act as he "did not make final proof in support of his original entry until after the classification or designation of the township."

This action was evidently taken under the general circular of instructions, construing said act, issued December 14, 1909 (38 L.

D., 361). It is stated, in section 5 thereof, as to section 3 of said act, providing for additional entries, that:

This section contemplates that lands may, subsequent to entry, be classified or designated by the Secretary of the Interior as falling within the provisions of this act, and in such cases an entryman of such lands who had not at the time of the classification or designation of the lands made final proof may make such additional entry provided he is otherwise qualified.

Allowance of this entry being in accordance with departmental construction of the law, as apparently understood and applied by your office, it was proper and there is no basis for contest in this case. The contest affidavit was, therefore, properly rejected, and your decision is affirmed.

Further consideration, however, of said act and of said instructions convinces the Department that this construction of the act is not in accordance with the true principle of the law, and that the circular of instructions was misleading in the concluding statement quoted. It was evidently the intent, in such statement, to hold merely that the classification or designation, prior to final proof, of the land as subject to entry under the act fixes the inception of the additional right conferred by said act. It was not intended to hold further that the additional right is thereby complete irrespective of subsequent conditions. While the right to make additional entry has its inception at the date of such classification and designation, the law places upon the exercise of such right the limitation that it must be exercised prior to final proof under the original entry. Said section 3 provides:

That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry, which shall not, together with the original entry, exceed 320 acres.

The effect of this provision upon an entryman whose original entry has not gone to final proof at the time the lands are made, by such classification and designation, subject to such additional entry, is to merge his existing right under his original entry into the enlarged right given by said act, the proper exercise of which, however, is determined, by the express terms of the law, by the conditions existing at the time the right is attempted to be exercised. The law requires that such right be exercised prior to final proof under the original entry. If, therefore, an entryman, having acquired this additional right, fails so to exercise it, and makes such final proof under his original entry alone without applying, in exercise of his additional right, under said act, he thereby elects to retain the lands under his original entry as in full of his enlarged right and an exhaustion thereof, and is debarred from additional entry under said act thereafter.

Said circular should be amended in accordance with the foregoing. Circular of July 18, 1910 (39 L. D., 96), under act of June 17, 1910, should be likewise amended.

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**SOLDIERS' ADDITIONAL—LOCATION OF INVALID RIGHT—INTERVENING CLAIM—SUBSTITUTION.**

**SMITH v. WHITEHEAD.**

An application to locate a soldiers' additional right does not preclude the filing of an adverse application to enter the same land, subject to determination of the validity of the additional right; and in case the additional right be found invalid, the intervening adverse application attaches and bars substitution of another right in lieu of the one held invalid.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 14, 1910.* (W. L. C.)

This is a petition by Robert L. Whitehead asking the Department to exercise supervisory authority and reconsider its decision of June 16, 1910, on review (not reported), reversing your decision of August 4, 1909, and for equitable reasons stated recognizing the right of Emerson D. Smith, as against said Whitehead's application to make homestead entry of the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of Sec. 13, T. 2 N., R. 35 E., Roswell, New Mexico, land district, to substitute subsequently to said application a valid assigned claim under section 2306, Revised Statutes, in lieu of an invalid one thereunder filed prior to Whitehead's application.

The filing of an application based upon a soldier's right under said section of the Revised Statutes has been held not to be such an entry or appropriation of the land covered in such application as to preclude the filing or receipt of other applications for entry thereof, but all such subsequent applications are held, under the settled practice of the Department, to be properly received and filed, action on same being withheld to await the determination of the validity of such soldier's right upon which the first application is based. Frederick L. Gilbert *et al.* (35 L. D., 422).

Under such practice, the filing of an intervening adverse claim—as an application to make homestead entry of the land—prior to an application to substitute, for such soldier's right, shown to be invalid, a valid soldier's right, deprives the Department of power to allow such substitution, as held by the United States Circuit Court of Appeals for the Eighth Circuit in the case of Robinson *et al. v.* Lundrigan (178 Fed. Rep., 230).

Upon reconsideration, the Department is disposed to follow that decision, and the decision herein of June 16, 1910, is accordingly va-



cated and set aside and that of November 30, 1909 (not reported), affirming your decision appealed from, which was recalled and vacated by said decision of June 16, 1910, is hereby restored and adhered to. You will take the proper proceedings to carry out the present holding.

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**RIGHT OF WAY—POWER-SITE STIPULATION.**

**DENVER AND RIO GRANDE R. R. CO.**

Under the rule laid down in departmental decision in Continental Tunnel Railway Company (39 L. D., 86), the power-site stipulation set forth in the regulations of January 29, 1910 (38 L. D., 405), will no longer be required of applicants for right of way; but where an application accompanied by such stipulation has been approved, without a preliminary investigation having been made, the stipulation will not be canceled or surrendered unless the company will relinquish all rights it may have acquired under the approval, to the end that it may be determined whether the right of way is so situated with reference to water courses susceptible of power development as to require the withdrawal of the land involved for power purposes, and whether use of the land is essential to development of the power.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(O. L.) *Land Office, September 15, 1910.* (S. W. W.)

The Department has considered the letter submitted by your office, under date of September 8, 1910, for my approval, recommending that the power site stipulation required of the Denver and Rio Grande Railroad Company, in connection with an application for a right of way under the act of March 3, 1875 (18 Stat., 482), approved by the Acting Secretary March 24, 1910, be canceled and surrendered.

The recommendation of your office is based upon the opinion of the Assistant Attorney General for this Department, rendered June 14, 1910, and on decisions of the Department, which, your letter states, were rendered July 19, in the case of Spokane, Wallace and Interstate Railroad Company, and July 22, case of Skagit Power Company (39 L. D., 89).

Under the rule now obtaining the Department will not require the power site stipulation heretofore exacted of railway companies applying for rights of way under said act of 1875, but will first ascertain whether or not the land is valuable for power sites, and whether or not the alignment of the proposed road may be so changed as to not interfere therewith, the rule being laid down clearly in the Department's decision of July 11, 1910, in the case of Continental Tunnel Railway Company (39 L. D., 86).

However, the application in question was approved without making any preliminary investigation, because of the company's stipulation, and such being the case the Department is not disposed to

cancel or surrender the stipulation unless the company will relinquish all rights that it may have acquired under the approval, to the end that it may be determined whether the right of way is so situated with reference to water courses susceptible of power development of such magnitude as to require the withdrawal of the land involved for power sites, and whether the use of such land is essential to the development of such power.

The approval heretofore obtained was granted upon the company's stipulation, and unless the company will, as above indicated, relinquish all rights obtained under that approval, the Department must refuse to cancel and return the stipulation.

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**ATTORNEYS—ADMISSION TO PRACTICE—DISBARRED ATTORNEYS.**

**ORDER.**

DEPARTMENT OF THE INTERIOR,  
*Washington, September 15, 1910.*

**TO THE SEVERAL BUREAUS AND OFFICES OF THE INTERIOR DEPARTMENT:**

It is hereby ordered that hereafter firms of attorneys or agents, as such, will not be admitted to practice before this Department, or recognized as having the right to appear before it or any bureau or office thereof, in any proceeding or matter involving the services of an attorney or agent, and in the presentation of any matter by any such firm it must be represented by one or more duly qualified members thereof in his or their own proper person: *Provided*, That this order shall not be construed to prevent such firms of agents or attorneys from filing powers of attorney from clients as evidence of authority to represent such clients, but the power, when filed, must be accompanied by an appearance in that behalf, in writing, signed by one or more duly qualified members of such firm, and all pleadings, briefs, or memoranda filed in the further presentation of any such matter by the firm shall be similarly signed.

If any firm of attorneys or agents shall retain as a member thereof, or receive into such membership any person who stands disbarred or suspended from the practice of this Department, its bureaus or offices, all of the members thereof who may have been admitted to practice shall be subject to disbarment.

This order is in lieu of departmental order of July 28, 1910, and all regulations of this Department in conflict herewith are hereby vacated and annulled.

FRANK PIERCE, *Acting Secretary.*

## SOLDIERS' ADDITIONAL RIGHT—ASSIGNEE—RECOGNITION OF CLAIM.

## NELLIE J. HENNIG (ON RE-REVIEW).

Where one claiming as assignee of a soldiers' additional right is advised by the land department that his claim will be recognized and location of the right allowed upon the evidence of ownership then on file, the subsequent allowance of a location based upon the same right, by another not claiming in privity, in the face of such assurance and without notice to claimant, will not prevent the Department from recognizing the right of claimant to make location under the right.

Departmental decisions herein of August 26, 1909, and February 9, 1910 (38 L. D., 443, 445), recalled and vacated.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(O. L.) *Land Office, September 15, 1910.* (S. W. W.)

This is the petition of Nellie J. Hennig for reconsideration of the Department's decision of February 9, 1910 (38 L. D., 445), denying her motion for review of the decision of August 26, 1909 (38 L. D., 442), which affirmed your decisions of July 8, 1908, and May 13, 1909, rejecting her application to make soldiers' additional homestead entry of the SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 20, T. 6 S., R. 8 E., Bozeman, Montana, land district.

It appears that James H. Schouten was entitled to an additional homestead right of 49.22 acres under section 2306 of the Revised Statutes; that he executed powers of attorney June 26, 1875, in which he was joined by his wife, constituting and appointing Charles D. Gilmore his attorney-in-fact to locate his soldiers' additional homestead right with power to sell the land located, and in consideration of the sum of \$100, the power was declared to be irrevocable and all claim to the proceeds of the sale of land located under said right was released to the attorney-in-fact, there being also a release by the wife of all claim of dower in the land located and all right or interest growing out of said additional right.

October 1, 1875, additional homestead entry No. 1061 was made in Schouten's name for the N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 27, T. 27 N., R. 6 E., containing eighty acres, Susanville, California, land district, but no final certificate was issued on this entry for the reason that at the time it was made Schouten had not made proof on his original entry, and, under the practice then obtaining, final certificates were not issued on additional entries unless final proof had been made upon the original entry on which the additional was based. Considering this entry, your office, under date of March 11, 1890, informed the register and receiver that the rule of approximation required that the excess shall be less than the difference between the quantity to which the party was entitled and the next smaller legal subdivision, and as Schouten was entitled to 49.22 acres as an additional right,

under the rule of approximation he could enter only a forty-acre tract, and inasmuch as he had entered two forty-acre tracts he was allowed sixty days in which to elect which of the tracts he desired to retain.

It should be stated here that the local office was further directed to notify Schouten that there was on file in your office his letter of March 10, 1882, in which he alleged that the additional entry was unauthorized and that the papers in relation thereto, purporting to have been signed by him, were not so signed; that by your office letter of March 27, 1882, he had been advised that his signature to the papers seemed to be genuine and as no further action had been taken he would be allowed sixty days in which to submit proof tending to show that his said additional entry was fraudulent, together with an application asking that the same be canceled without prejudice to his right and an application to enter some specific tract of land. By letter of same date the Sierra Lumber Company was informed of the action taken.

It further appears that as proper notice of the foregoing had not been given the parties in interest, your office, under date of September 30, 1893, directed the local office to properly notify the entryman and the Sierra Lumber Company that sixty days would be allowed for the approximation of the entry, failing in which it would be held for cancellation; that on the date of December 29, 1893, the local office transmitted evidence of transfer in a number of the cases including the entry under consideration, the same having been filed by the Sierra Lumber Company. This evidence commenced with a deed from Alvinza Hayward to the Sierra Flume and Lumber Company and was followed by various judicial decrees and mesne conveyances, but as no evidence was submitted showing how Hayward derived title from the entryman, your office, under date of February 20, 1894, issued a call for such evidence, as a result of which on April 28, 1894, the local office transmitted evidence of a transfer consisting of the power of attorney from Schouten to Gilmore authorizing him to locate the right and sell the land located, accompanied by a deed from Gilmore to the said Hayward.

Considering this evidence, your office in the decision of November 7, 1894, held that it showed that the additional right, as well as the entry made thereunder, was transferred for a valuable consideration, but inasmuch as it appeared that the area located was excessive and that an approximation, which had been theretofore required had not been made, the entry was held for cancellation, and it was in fact canceled April 15, 1895.

February 19, 1900, the Sierra Lumber Company, as transferee of Schouten, made application for the reinstatement of the entry, and

in your office decision of October 10, 1900, denying the application it was stated:

As an entry of the soldiers' additional right of Schouten has never been perfected it appears that the Sierra Lumber Company may, as the assignee of the said Schouten and purchaser of said right for a valuable consideration, apply to enter, using the same to the amount of 49.22 acres upon any of the public lands of the United States now subject to entry, relying upon the papers on file herein to support such application and authorize its allowance.

The decision of your office denying the application for reinstatement was affirmed by the Department April 13, 1901 (30 L. D., 547), where it was stated that—

Whatever rights were acquired by said additional entry passed to and became vested in the Sierra Lumber Company in so far as such conveyances and proceedings could transfer an interest in government land upon which final payment had not been made.

It is further shown that March 4, 1901, Schouten assigned to William E. Moses all his right, title and interest in and to his soldiers' additional right, at which time he also executed an affidavit stating that he had never exercised said right or sold or transferred it to any one. Moses assigned forty acres of the right to John W. Kinzel November 9, 1901, and 9.22 acres to George Ferguson, March 31, 1903. Kinzel located his right and his application was forwarded to your office November 25, 1901, and allowed by letter of April 14, 1903. Patents have been issued on both the Kinzel and Ferguson locations.

July 8, 1906, N. P. Chipman, who had succeeded to whatever rights were acquired by Gilmore under the power of attorney which was executed by Schouten in 1875, assigned the right to F. W. McReynolds, who, on August 9, 1906, assigned forty acres thereof to Nellie J. Hennig, and the latter on January 7, 1907, filed her application to make entry under said right of the tract here involved. This application was rejected by your office decision of July 8, 1908, for the reason that whatever right was acquired by the attorney under said power had passed to the grantee of the entryman who was holding under such conveyance at the time of the cancellation of the entry; that such grantee was the Sierra Lumber Company, and inasmuch as Hennig traced her title back only to Chipman, your office held that he had no interest therein at the time he attempted to assign the same to McReynolds. The action of your office was based upon the further ground that the right had been satisfied by the entries made by Kinzel and Ferguson under the assignment to Moses, and a motion for review of that decision having been filed by Hennig, who also filed in connection therewith a transfer and assignment by the Sierra Lumber Company to Chipman, executed December 1, 1908,

it was denied by your decision of May 13, 1909, in which it was stated that—

If, as is claimed, the legal right to said claim was in Chipman at the date of the office decision quoted, October 10, 1900, it must be held that Chipman by delaying for nearly six years in asserting same, and thus permitting another with apparently good title to assert the right and procure patent thereon, was guilty of laches, and between him and his transferees and the government the right is satisfied by the patent already issued.

In affirming the action of your office, the Department held that the decisions in the cases of Henry Walker and Lorenzo D. Chandler (25 L. D., 119, 205), were authority for the conclusion reached; that those decisions rested upon the principle that the Department can not in any case where it appears that additional entry has already been allowed for lands to which the soldier was entitled, thereafter recognize any claim by a purchaser from the soldier of his additional right where the purchase was made prior to the allowance of the entry but where the Department had no notice at the time of allowing the entry; and it was further held that such notice must consist of an assertion of claim to make entry under said right either by an application to enter or some action of the land department in some manner involving the assertion or validity of the claim; and that a mere expression of opinion in a decision not involving an application or assertion of a claim to exercise such right, would not be notice.

It is urged in behalf of the petitioner that the notice of ownership of the Sierra Lumber Company was in the possession of the Department at the time of the allowance of the entries made under the assignment to Moses, and that Department should be controlled by what is shown by its own records. It is contended that in the examination made by your office when an application to make a soldiers' additional entry is filed, it is necessary to examine the original homestead entry and all the papers and records relating thereto, and that in the course of such examination, which must be made in every case where there is a proper adjudication, evidence will be found of all former applications made in connection therewith.

It is also urged that the action of your office in advising the Sierra Lumber Company that it might locate the right of Schouten and rely upon the evidence on file in the office in support of such right, was sufficient to justify Chipman in purchasing the right from the lumber company, and that he did so in full reliance upon the solemn statement made by your office that such right would be recognized.

Upon careful consideration the Department concludes that there is much force in the petitioner's contention. It is true that the Department has uniformly held that where those who purchase bounty land warrants and soldiers' additional rights of this char-

acter do not take any steps for the purpose of informing the Department of their rights, such persons are entitled to little or no consideration if, on account of their failure to advise the Department, another should present himself and establish *prima facie* right of ownership and thus be allowed to receive the benefits provided by the statute. This rule is absolutely necessary to a prompt administration of the laws and for the protection of the government in that behalf. However, such facts do not obtain in this case. It is shown that even before the cancellation of the additional right made at Susanville, your office had notice of the claim of the Sierra Lumber Company and held that the company was the assignee of the right, as well as the transferee of the land located, and this statement was reaffirmed in your decision of October 10, 1900, *supra*.

Notwithstanding the fact that your office was fully advised as to the claim of the Sierra Lumber Company and had officially informed the company that it might locate the right of Schouten and rely upon evidence on file in your office to support the claim, other persons were allowed to locate the right without claiming any privity with the Sierra Lumber Company during the same year that the right of the lumber company was finally denied, and this location was afterwards allowed, and patented without any notice whatever to the lumber company.

It is the duty of this Department to see that the public lands are disposed of in accordance with the laws. This duty while requiring the Department to safeguard the interest of the government, also requires that reasonable protection be afforded the rights of individuals, and where they have filed in the proper office information respecting claimed rights, common justice demands that no action destroying such right should be taken without affording the parties an opportunity of being heard. This principle has not been observed in this case.

Considering the rights of parties under acts of public officials, the Department has said:

It is a well established principle that the acts of public officials, performed without authority, are null and void and that the government is not bound by the unauthorized exercise of power by its officers and agents. *Hunter v. United States* (5 Pet., 173); *Lee v. Munroe* (7 Cranch, 366). In such cases there is no room for the application of the doctrine that a subsequent bona fide purchaser is protected. *Moffat v. United States* (112 U. S., 24). But there is a well recognized distinction between the act of a public official who transcends his power and authority and the mere erroneous act of such official who misjudges in matters that the law confides to his jurisdiction. If he acts without authority, it is not the act of the government, but if his act is within the scope of his authority and power to adjudicate and determine, it is the act of the government, and an innocent party who acts upon such determination is entitled to protection although the decision may be based upon erroneous findings of the facts or a misinterpretation of the law. [Duncan G. Malloy, 37 L. D., 198.]

The cases of Henry Walker and Lorenzo D. Chandler, heretofore relied upon by the Department, are found upon careful consideration to be not in point, because in those cases it was expressly held that if the parties had made known to the government the fact of their purchase and had asserted their rights before the subsequent entry was allowed, it could not be held that the subsequent entry in any way affected the rights acquired under the original purchase and assignment. As shown above, the land department had notice of the claim of the lumber company and that claim had been asserted in the most positive manner by the formal application for reinstatement of the canceled original entry.

Whatever may have been the effect of the powers of attorney executed by Schouten in 1875, and the subsequent sale of the land located thereunder, it is believed that the action of your office in twice informing the Sierra Lumber Company that it would be recognized as the purchaser of the right, was an adjudication of that matter by the proper authority and is binding upon the Department. As was said by the Circuit Court, District of Oregon, in the case of *United States v. The Dalles Military Road et al.* (41 Fed. Rep., 493, 501):

Whatever is inequitable as between man and man in their dealings with each other should also be deemed inequitable between the United States and those with whom they condescend to deal under like circumstances.

See also *United States v. Bradford* (148 Fed. Rep., 413, 420), and the case of *Charles D. Mousso* (22 L. D., 42).

The people have a right to rely upon the good faith of the government and its duly appointed officers. They have a right to believe that their legal rights will be protected, and that the Secretary of the Interior will do justice.

Considering the authority of the Secretary of the Interior, the Supreme Court has said:

It is obvious; it is common knowledge, that in the administration of such large and varied interests as are entrusted to the land department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, must sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him in the face of these unexpected contingencies to do justice.

*Knight v. United States Land Association* (142 U. S., 161, 181), quoting from the language of the same court in the case of *Williams v. United States* (138 U. S., 514, 521).

The entire matter considered, the decisions of August 26, 1909, and February 9, 1910 (38 L. D., 442, 445), are recalled and vacated, and your office will adjudicate the case in accordance with the views expressed herein.



**CONTEST—CONTESTANT—RELINQUISHMENT—PREFERENCE RIGHT.****REGULATIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., September 15, 1910.*

**REGISTERS AND RECEIVERS,***United States Land Offices.*

GENTLEMEN: In accordance with departmental instructions contained in the decisions in the cases of *Crook v. Carroll* (37 L. D., 513), *James v. Stanley* (37 L. D., 560) and *William J. Stock v. Oscar E. Herman and James Gibson* (39 L. D., 165), the following regulations are issued for your guidance:

1. In order to entitle a contestant to the preference right of entry conferred by section 2 of the act of May 14, 1880 (21 Stat., 140), it must appear not only that he has contested the entry and paid the land office fees in that behalf, but that he has actually procured the cancellation of the entry.

2. Where a good and sufficient affidavit of contest has been filed against an entry and no notice of contest has issued on such affidavit, or, if issued, there is no evidence of service of such notice upon the contestee, if the entry under attack should be relinquished, you will, as heretofore, immediately note the cancellation of the entry upon the records of your office. In such cases for purposes of administration a presumption will obtain that the contest induced the relinquishment and no other entry of the land will be allowed until the following proceedings are had: If the relinquishment is filed by a person other than the contestant, you will at once notify the contestant thereof that he may take appropriate steps to make the entry if desired. To that end you will suspend all applications filed by others than the contestant within the period awarded successful contestants to make entry; should the contestant during this period present application, in the absence of other intervening application, his entry will at once be allowed, but if an intermediate application has been filed by another you will at once notify such intervening applicant of the claimed rights of the contestant and that it will be necessary for him, the intervening claimant, to show, if he desires, that the relinquishment was not the result of the contest, and that in the event he, within twenty days from the receipt of such notice, apply for a hearing for that purpose, the same will be ordered with at least thirty days' notice to all interested parties, otherwise the intermediate application will be rejected and contestant's application allowed. At said hearing it shall be competent for the contestant to show that the former entryman or some one in privity with him in the sale or purchase of the relinquishment had knowledge of the

filing of the affidavit of contest, in rebuttal of any showing made by the applicant. If it satisfactorily appear from the testimony that the relinquishment was not the result of the contest, the intermediate applicant will prevail, otherwise the application of contestant will be allowed as in the exercise of a preference right.

3. Where it appears of record that the defendant has been served with notice of contest personally or by publication, it will be conclusively presumed as a matter of law and fact that the relinquishment was the result of the contest and the contestant will be awarded the preference right of entry without necessity for a hearing.

4. Where, prior to hearing in a contest, a junior contest is filed, alleging a valid ground for the cancellation of the entry and, in addition thereto, the collusive nature of the prior contest, the junior contestant may, if the entryman has been served with notice of the prior contest, intervene at the hearing and submit testimony in support of his charges. Should the junior contestant elect to offer testimony in support of his charge of collusion only, he will not gain a preference right of entry, if such charge be established. If, at the time of the filing of the junior contest, notice is not issued on the prior contest, you will issue such notice and at the same time notice on the junior contest; the latter notice must recite all the charges contained in the affidavit and state, in addition, that the junior contestant will be allowed to appear at the time set for taking testimony in the prior contest and offer evidence in support of his charges. The junior contestant will be required to serve notice on both the prior contestant and the entryman.

5. If, before the case proceeds to a hearing, the entryman's relinquishment be filed, both contestants must be notified of the cancellation of the entry and of their right to apply to enter the land within thirty days after the receipt of such notice. Should both apply within such period, you will set a day for hearing, of which each shall have at least thirty days' notice, at which the junior contestant will be allowed to prove his charge of collusion and so defeat the claimed preference right of the prior contestant. An application to enter by a party other than either of the contestants, presented within the preference right period, must be suspended to await the action of the contestants in asserting their preference rights.

6. Where a junior contest charging collusion is not filed until after the prior contest has proceeded to a hearing, it will be suspended, pending the closing of the latter case, and must wholly fail if the entry be canceled as the result of the prior contest. This, however, will not prevent the junior contestant from attacking the application of the successful contestant to make entry, upon the ground of collusion or for any other valid cause, should the latter attempt to exercise the preferred right of entry, nor, should the prior contest result in

favor of the entryman, will the junior contestant be precluded from prosecuting his case if his affidavit, in addition to the charge of collusion, states a sufficient ground for the cancellation of the entry other than the charge involved in the trial of the prior contest.

7. These regulations are in lieu of departmental regulations of June 1, 1909 (38 L. D., 23).

Respectfully,

FRED DENNETT, *Commissioner*.

Approved:

FRANK PIERCE, *Acting Secretary*.

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**RELINQUISHMENT—SUPERIOR ADVERSE CLAIM—SECOND ENTRY.**

**PATRY v. ROWE.**

The relinquishment of a homestead entry in good faith, to avoid controversy with an adverse claim of prior right believed or reasonably apprehended to be superior, is in effect a confession of judgment of cancellation for conflict, and not such a relinquishment as contemplated by the act of February 8, 1908, and is no bar to a second entry.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 16, 1910.* (J. R. W.)

Alfred A. Rowe appealed from your decision of April 15, 1910, holding for cancellation his homestead entry as to SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 1, T. 48 N., R. 18 W., Duluth, Minnesota.

The land is part of the ceded Chippewa agricultural lands opened September 15, 1908, to settlement and entry under acts of January 14, 1889, June 27, 1902, and May 23, 1908 (25 Stat., 642; 32 Stat., 400; 35 Stat., 268). When the land was opened to entry Rowe made entry for the entire SW.  $\frac{1}{4}$ , Sec. 1. On the same day Herman Patry made entry for the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , alleging prior settlement.

Hearing was had between the parties during which Patry filed affidavit that he previously perfected homestead entry for 120 acres and now applied for the 40-acre tract in question as additional thereto under act of February 8, 1908 (35 Stat., 6). The local officers found in favor of Patry and recommended that Rowe's entry be cancelled as to this tract. You reversed that action.

The undisputed facts are that on August 15, 1905, Patry made homestead entry for N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 5, T. 48 N., R. 17 W., ceded Chippewa lands opened to entry that day. September 7, 1905, George A. Rooney filed homestead application, which conflicted with Patry's entry as to the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and Rooney claimed settlement at nine a. m. August 15, 1905, the moment that

Patry made his application. A hearing was ordered, but before testimony was taken Patry became convinced that Rooney in fact initiated settlement fifteen minutes before Patry's entry at the land office; whereupon consultation was had between Patry, Rooney, Rooney's son-in-law, Vibert, and Rooney's attorney. Rooney was willing to reimburse Patry for any expense he had been put to if Patry would relinquish the forty acres in conflict, but Rooney's attorneys advised Patry that if he accepted any consideration for his relinquishment his homestead right would be exhausted, but if he relinquished without consideration he would have right to make a second entry for forty acres. Patry then filed relinquishment as to the forty acres in conflict without having received or been promised any consideration in the future. Two weeks afterward Vibert, Rooney's son-in-law, called Patry into Vibert's office and said to him that Patry had acted fairly about the land and relinquished without trouble. "You are a poor man and we would like to recompense you a little for your trouble and expense, as you would not accept anything for your relinquishment." Patry feared that his taking the money might interfere with his right to make a second entry, but Vibert said:

No, you relinquished without payment and that matter is ended. I am doing this myself. I want to make you a present of \$25.00, and have a right to do that if I want to.

You held there was not any speculation or consideration received or promised, but that the act of relinquishing, under the circumstances that confronted Patry, was commendable and one that should be encouraged. Your so holding was clearly right upon the facts existing. A relinquishment made in face of an adverse claim believed or reasonably apprehended to be superior is not within the law inhibiting the second entry. The right to settle a controversy amicably is one conducive to public peace and commendable. In *Keane v. Brygger* (160 U. S., 276, 287) the court said:

It would be a strange doctrine to announce that a party did not have the right to relinquish any right that he had to or in any property, and that it was the intention of the government to compel its citizens to go to the expense and delay of a contest to extinguish an interest of another citizen who was willing to make a disclaimer of that interest.

The land department in repeated decisions has commended such conduct. *Orlando Starkey*, 7 L. D., 385, 386; *James A. Forward*, 8 L. D., 528; *Thurlow Weed*, 8 L. D., 100; *Charles Wolters*, 8 L. D., 131; *James M. Frost et al.*, 18 L. D., 145; *Anna Lee*, 24 L. D., 531, 533; *Dyar v. Jones*, 35 L. D., 499.

Nothing in the evidence shows that the payment by Vibert to Patry was according to a pre-arranged plan or promise. That fact is expressly negatived by the evidence. But had it been so, the

acceptance of such sum would not have been a speculation in violation of the act of Congress, if in fact Patry believed Rooney's right was superior to his own and that fact was the controlling reason for releasing his right.

In cases of relinquishment for a consideration the nature of the primary cause must be considered. If the moving cause for the relinquishment involves any failure of the entryman himself to comply with the law the payment of a consideration and relinquishment to avoid controversy is presumptively a confession of judgment by the entryman that he has not complied with the law. He is bound at all times to defend his own good faith in an entry in compliance with what the law requires of him. A consideration accepted under such circumstances and a relinquishment filed is presumptively induced by the consideration and knowledge that he has not complied with the law. It is different where the case is one of conflict and the entryman is met with an assertion of prior right. In such case he is not bound to contend. He may admit a prior right asserted against him. As shown by the decisions above cited this is a well settled rule of public policy conducive to peace and good order. Such a claim an entryman is not bound to resist. It does not impugn his good faith. In such case a consideration paid, unless clearly shown that it was the moving cause for the relinquishment, is immaterial and does not affect his right.

Your decision is affirmed.

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STATE OF MINNESOTA *v.* CAVASIN.

Motion for review of departmental decision of November 3, 1909, 38 L. D., 284, denied by First Assistant Secretary Pierce, September 17, 1910.

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WISCONSIN CENTRAL RAILROAD SETTLERS—SECTION 6, ACT OF MAY 29, 1908—JOINT RESOLUTION OF JUNE 25, 1910.

LEOPOLD BAUER (ON REVIEW).

The joint resolution of June 25, 1910, construing section 6 of the act of May 29, 1908, does not have the effect to validate an entry made under that section in the interest of a transferee and in furtherance of an attempted transfer of the right of the settler prior to the acquirement of a vendible interest by him.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 19, 1910.* (G. B. G.)

This is a motion by B. B. Jones, attorney, on behalf of Leopold Bauer, for review of departmental decision of February 21, 1910

(38 L. D., 460), affirming your office decision of November 26, 1909, holding for cancellation a final homestead entry made in the name of the said Leopold Bauer under section 6 of the act of May 29, 1908 (35 Stat., 465), for lot 7, SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and lot 9, Sec. 14, and lot 3, Sec. 23, T. 4 N., R. 93 W., Glenwood Springs land district, Colorado.

The material facts in the case were set out at length in the decision under review, and it will not be necessary to restate them here, further than to say that these facts constituted the said Leopold Bauer a beneficiary under section 6 of said act, which provided, among other things:

That all qualified homesteaders who, under an order issued by the Land Department bearing date October twenty-second, eighteen hundred and ninety-one, and taking effect November second, eighteen hundred and ninety-one, made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Chicago, Saint Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wisconsin Central Railroad Company against Forsythe (one hundred and fifty-ninth United States, page forty-six), shall, in making final proof upon homestead entries made for other lands, be given credit for the period of their bona fide residence upon and the amount of their improvements made on the lands for which they were unable to complete title. . . . *Provided*, That no such person shall be entitled to the benefits of this Act who shall fail to make entry within two years after the passage of this act.

In the decision under review it was held, in substance, that the purpose of section 6 of said act was to place persons within the descriptive terms thereof in the same relative position as to other lands which they might enter within the prescribed period as they, up to the time of the court's decision in the case of said railroad company against Forsythe, had assumed they occupied with reference to the lands settled upon within the railroad grants, and it was further held (syllabus):

Where prior to actual knowledge that the land he had settled upon was not subject to homestead entry the homesteader had so far complied with the law as to have acquired a vendible interest in the land if it had been subject to such entry, the right conferred upon him by the act of May 29, 1908, would be transferable to the same extent as his interest in the land settled upon would have been; but any attempted transfer of such right by one who had not prior to such knowledge sufficiently complied with the law to acquire a vendible interest, confers no right upon the purchaser, and an entry allowed under such attempted transfer, in the name of the homesteader but in the interest and for the benefit of the transferee, is void.

It is admitted that the entry in question was made in the interest of B. B. Jones, the said Bauer having, previous to that time, assigned all his rights under said act of May 29, 1908, to Jones.

On the record as presented to the Department upon the appeal, and upon which the decision under review was rendered, no new

question of law or fact is raised, and nothing suggested which would justify reopening the case. The attention of the Department, however, is directed to a joint resolution which appears to have been approved by the President of the United States June 25, 1910, "construing section six of the act of May twenty-ninth, nineteen hundred and eight," and which reads as follows:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in computing the time for which credit shall be given to the homestead settlers, their widows or minor heirs, under the provisions of section six of the act of May twenty-ninth, nineteen hundred and eight, entitled "An act authorizing the resurvey of certain townships in the State of Wyoming; and for other purposes," credit shall be given for the full period of actual residence upon the lands to which they were unable to complete title: Provided, That such credit shall not extend beyond the date of judgments in ejectment against such settlers rendered by the courts.*

SEC. 2. That the limitation of time in which second entries may be made under section six of the act aforesaid shall be extended for the period of twelve months from the date of the passage of this resolution.

It is contended that this joint resolution was intended to validate, and does validate, the class of entries here in question. Of this it will be enough to say that under date of June 25, 1910, the same day this resolution was approved by the President, it received the consideration of this Department, and in a communication of that date, addressed to the President, the Secretary of the Interior expressed the view that if it were the purpose of the joint resolution to validate this and similar entries it signally failed in that purpose. In the course of that letter it was said:

It is well known to this Department that Mr. Jones was largely instrumental in securing the passage of the resolution under consideration, presumably, with an idea that it would validate his contracts with the Wisconsin settlers above referred to. If this resolution would have that effect, I could not too strongly recommend that it be vetoed. In my opinion, however, no such effect could be given to the resolution for the reason that the section of the act of 1908, amended thereby, would merely permit the crediting of residence "upon homestead entries made for other lands," and in the making and perfecting of such an entry the homesteader would be required to show that such entry was made in and for his own exclusive benefit and not in the interest of another.

Because of the fact that this Department did not report upon the resolution while pending before Congress, I have thought it advisable to make this extended statement, and as I believe the act of 1908 as construed in the decision of February 21, 1910, went as far as relief should be extended, I therefore recommend that the resolution do not receive your approval.

On further consideration this Department is still of opinion that the entry in question was invalid when made; that it was not validated by said joint resolution; that it was made in fraud of the public land laws; and that it can not be permitted to stand.

The motion for review is denied.

**DECEASED HOMESTEADER—COMMUTATION BY WIDOW—RESIDENCE AND CULTIVATION.****ELIZABETH ALLEN.**

The widow of a deceased homesteader who had complied with law up to the time of his death is entitled to commute her husband's entry upon showing both residence and cultivation, immediately succeeding his death, for a period which, added to the time of his compliance with law, will amount to fourteen months' residence and cultivation, provided proof be seasonably made.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.) *Land Office, September 19, 1910.* (C. J. G.)

A motion has been filed by Elizabeth Allen, widow of William T. Allen, for review of departmental decision of May 24, 1910 (not reported), which affirmed the action of your office in rejecting commutation proof and holding for cancellation final certificate issued upon homestead entry made by said William T. Allen for the SE.  $\frac{1}{4}$  of Sec. 10, T. 63 N., R. 21 W., 4th P. M., Duluth, Minnesota.

The entry was made March 11, 1907, and the entryman was granted leave of absence for a year from October 23, 1907. It appears that he established residence on the land September 3, 1907, and continued such residence with his family until October 23, 1907. They returned to the land April 1, 1908, and remained there until July 27, 1908, leaving on account of the illness of the entryman, who died August 1, 1908. Commutation proof was submitted by the widow March 22, 1909, upon which certificate issued April 7, 1909. After her husband's death the widow attempted to have the land cultivated and improved, but she never resided thereon. Your office found:

A period of actual and constructive residence upon and cultivation of the land from the date of entry March 11, 1907, to July 27, 1908, when they left the land, exclusive of five months and eight days' leave of absence, amounts to eleven months and eight days, which does not meet the requirements of the commutation law in such cases.

It was contended upon appeal here that Elizabeth Allen, as widow of the deceased entryman, is entitled to commute upon showing cultivation of the land after his death without herself residing thereon. The Department sustained the action of your office in rejecting the commutation proof, reference being made to the case of *Wilson v. Heirs of Smith* (37 L. D., 519), as being conclusive of the question involved, in which case it was held:

The heirs of a deceased homestead entryman who during his lifetime failed to comply with the law, may complete the entry by either residing upon or cultivating the land for the full period of five years, if sufficient of the lifetime of the entry remains for that purpose; or may commute upon a showing of residence and cultivation for fourteen months, but can not commute upon a showing of cultivation alone.



The entryman in the case referred to failed to comply with the law during his lifetime, and the facts of that case thus differ from the facts of the present one, wherein it appears that Allen complied with law as to residence up to the time of his death. But the principle involved, so far as commutation is concerned, is the same. The widow in this case would, no doubt, have been entitled to commute her husband's entry upon showing both cultivation and residence for a period immediately succeeding his death, which, added to the time he resided upon the land, would amount to fourteen months' residence from date of entry, exclusive of the period of his leave of absence (Esberne K. Muller, 39 L. D., 72), provided proof of the fact had seasonably been made. Under the express terms of section 2301 of the Revised Statutes, however, commutation can only be allowed upon a showing of both residence *and* cultivation for fourteen months, the language of said section being "upon making proof of settlement and of residence and cultivation for such period of fourteen months," and the widow or heirs of a deceased entryman can not be excused from complying with said section, the requirements of which differ in terms from those of section 2291 of the Revised Statutes, under which it is held that the widow or heirs of a deceased entryman may complete his claim by either residing upon *or* cultivating the land. The case cited in the motion for review—to wit, Agnew v. Morton (13 L. D., 228)—did not involve the question of commutation.

The motion for review herein is denied.

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**PRACTICE—PERSONAL NOTICE TO CONTESTANT OF PREFERENCE RIGHT.**

**HOLME v. JANKOWSKI ET AL.**

The powers and authority of an attorney at law representing the contestant in a contest proceeding end with the judgment of cancellation; and notice of such cancellation and of contestant's preference right of entry should be given to contestant personally and not to the attorney.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.)      *Land Office, September 22, 1910.*      (W. L. C.)

This is an appeal by Anfin Holme from your office decision of April 1, 1910, denying, as to the N.  $\frac{1}{2}$  of the lands hereinafter described, his application, filed February 16, 1910, for extension of time within which to exercise his preference right to make entry of the SW.  $\frac{1}{4}$ , Sec. 21, T. 130 N., R. 95 W., Lemmon, South Dakota, land district, for the assigned reason that notice of the cancellation of the entry upon which his preference right was based was "properly served on his attorneys, and was, therefore, in law notice to

himself," and that his failure to receive actual notice of such cancellation was due to his own neglect and failure to keep said attorneys informed as to his whereabouts.

The entry contested by appellant was made by Philip Jankowski March 23, 1907. Appellant filed contest affidavit, alleging abandonment, July 6, 1908, Brown Bros., Hettinger, North Dakota, entering appearance as his attorneys under general power from the contestant authorizing them to appear "in the above-entitled case" of contest. Personal service upon the entryman of notice of contest not being made, publication notice thereof and of hearing November 5 and 15 (final), 1909, was given, and on November 5, 1909, such hearing was had, the entryman not appearing, and proof of abandonment as charged was filed.

On November 10, 1909, Jankowski filed his relinquishment of said entry, admitting abandonment.

From statement by said attorneys it appears they were notified, December 2, 1909, to pay cancellation fee so preference right would issue to contestant, as stated. Whether they paid it does not affirmatively appear, but on January 17, 1910, they accepted service of copy of the local officers' decision awarding Holme a preference right, and received notice addressed to him in their care of such right, which they appear to have promptly and strenuously attempted to communicate to Holme, but owing to his absence at work in Minnesota, and the failure, as he says, of his brother at his usual address, given his attorneys, in North Dakota, to forward his mail, Holme did not receive such notice of his preference right until February 11, 1910, when he at once, as soon as he could close matters with his employer and get away, left Minnesota February 15, 1910, expecting to arrive and make his entry at the land office in time, as he would have done but for a snow storm, blockading the road for two days, so that he did not arrive and present his filing until February 19, 1910, two days after the expiration of thirty days from the date of the notice given said attorneys, who had, however, on February 16, 1910, filed this application for an extension of time within which he might make entry of these lands.

In the meantime, on December 2, 1909, Gunerious C. Flaten had filed his application to make entry of the N.  $\frac{1}{2}$  of said quarter section, his application being suspended for action by Holme under his preference right; and your decision herein awards to said Flaten the right to make entry of said N.  $\frac{1}{2}$  accordingly, because of Holme's failure to file within said thirty days, Holme being held entitled to make entry of the S.  $\frac{1}{2}$  of said quarter section in the absence of any adverse claim thereto.

For many years the practice has been to hold contestants bound by notice of their preference right given to the attorneys who had

represented them in their contest proceeding, under the general doctrine that notice to an attorney is notice to his client (3 L. D., 409; 9 ib., 70, 478; 10 ib., 324; 11 ib., 202; 15 ib., 307; 21 ib., 542). In the first case cited, only, was the question considered argumentatively, the Department stating, without citation of authorities, that the attorney's power in the matter does not end until notice of cancellation is given.

This holding, however, overlooks several important distinctions and rules of the law, and no departmental regulation or practice, however long continued, can override a plain statutory right, unambiguous and not the subject of construction (*United States v. Graham*, 110 U. S., 219; *United States v. Alger*, 152 U. S., 384; *Webster v. Luther*, 163 U. S., 331; *Francis M. Bishop*, 5 L. D., 429; *Hoyt v. Sullivan*, 2 L. D., 283).

The general rule is, as stated in 21 Am. & Eng. Encyc. of Law, p. 583, that:

Where a statute requires the giving of notice and there is nothing in the context of the law or in the circumstances of the case to show that any other notice was intended, personal notice must always be given—

this being the holding of the court in the principal case cited, *Beaks v. Da Cunha* (126 N. Y., 297).

This rule applies particularly in a class of cases where some statutory or contract right is to be acquired or penalty enforced after a specified notice; as for change of grade (*People ex rel. v. The L. & B. R. R. Co.*, 13 Barb., 211); or for removal from office of a policeman (*McDermott v. Board of Police*, etc., 25 Barb., 635); or for remaining in a state after notice to leave (2 Jones' L. R., 52, N. Car.).

The rule applies, as stated in *Wade on Notice*, Sec. 1334:

Where the statutory proceeding is one in derogation of common right, as the involuntary sale of the property of an individual, the statute must be strictly construed and closely pursued.

Particularly in point is the case of *Austin v. Tawney* (L. R. 2 Ch. App., 143), wherein the plaintiff was given by will an option of purchase of property, at its appraised value, for two months after appraisal, and notice of appraisal was given to the solicitor who had been representing him as one among the number of heirs and devisees. The court said:

I am clearly of opinion that the time to be allowed must begin only from the time when the plaintiff, by having the award communicated to him, was placed in a position to exercise his option. It is urged that the award was given out to the plaintiff's solicitor on the day when it was made, and that according to the principle that notice to the solicitor is notice to the client, the plaintiff must be taken to have known the contents of the award on that day. The cases in which the rule applies are cases between hostile parties where notice is received of an adverse right; but it has no application to a case like the present where the object of the testator merely was that his children shall have successive option to purchase to be exercised within reasonable limited times.

In the case also of *Haldane v. United States* (69 Fed. Rep., 819), where a Government circular-offer as to bids for supplies provided a successful bidder should execute contract and bond in ten days after notice of acceptance, the court said:

The doctrine is well established that when a statute requires notice to be given to a person for the purpose of creating a liability, personal notice is intended, unless some other form of notice is expressly authorized by the statute.

Citation may also be made to the cases of *K. B. Co. v. Batie*, 25 Ohio C. C., 486; *Dalton v. St. L. M. & S. E. Ry. Co.*, 113 Mo. App., 71; *LaFriend v. N. Y. C. & H. R. R. Co.*, 19 N. Y., Supp., 665.

In the case of *Dalton v. Ry. Co.*, cited, the court stated the lien notice "should be served on the defendant and the service on its attorney would not be good unless such matters came within the scope of his employment."

The Department also has held that service upon an attorney in fact, his powers in fact not appearing, of notice of a contest is not sufficient (*Norman v. Phoenix Zinc & Smelting Co.*, 28 L. D., 361).

The powers of an attorney in law end generally with the accomplishment of that for which he was employed. "There is no presumption of law that the relation of attorney and client continues after the termination of the litigation" (*Graves v. Hawley*, 50 Fed. Rep., 319), and service on the attorney in a subsequent proceeding "in its nature original" and not a part of the judgment suit is not sufficient, but must be upon the party (*ibid*).

In the case of *Chicago Sugar Refining Co., use etc. v. Jackson Brewing Co.* (48 S. W. Rep., 275, Tenn.), the court held that:

The knowledge of a debtor's attorney acquired after judgment against the debtor of the creditor's general assignment is not notice to the debtor.

And the Supreme Court of the United States held in the case of *Buddicum v. Kirk* (3 Cr., 293), Chief Justice Marshall delivering the opinion, that under a statute of Virginia requiring notice of depositions, service must be upon an attorney in fact, and service on the attorney in law was insufficient.

Applying these rules of law to this case, it must be held that the office of the contestant's attorney in a contest suit ends with the judgment of cancellation, and the local register is thereupon obligated by law to give the contestant notice of such cancellation, not as a precedent condition to the vesting of the preference right, which follows by operation alone of the law from the fact of the cancellation having been procured and contest fees paid by the contestant, but as a precedent condition of the limitation of such right, the basis for its termination, a "new proceeding," statutory in character, in derogation of the preference right and, as such, to be strictly construed and pursued.

This preference right is held to be a purely personal one, exerciseable only by the party or his privies in law and not assignable. An attorney in law has no functions to perform with reference thereto, and he can represent nothing, therefore, as to such right or its exercise. An attorney in fact, empowered to receive notice of cancellation upon which such right may be terminated, stands upon a different basis. But it does not appear that the attorneys in this case were Holme's attorneys in fact for the reception of such notice, and the notice was in fact addressed to him and not to them. While the long continued practice may operate as constructive notice to Holme that he would be held as bound by notice to his attorneys, it does not appear he had actual notice of such practice, and cancellation notice in this case to the attorneys was only indirect, as in the case of *Norman Saugsted v. Ned Fay* (39 L. D., 160), while such notices must be, as stated in that decision, strictly and literally in conformity to the rules.

It was held in that case that such notice to the attorney did not bind the contestant even as against an adverse claimant, and it was directed that in future such notice shall be served personally upon the contestants at their address of record.

Prior departmental decisions not in conformity with the views herein expressed will be no longer followed.

Your decision herein is accordingly reversed.

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**NORTHERN PACIFIC SELECTION—UNSURVEYED LAND—ACT OF MARCH 2, 1899.**

**DEERING v. NORTHERN PACIFIC RY. CO.**

Where unsurveyed land selected by the Northern Pacific Railway Company under the act of March 2, 1899, is found upon survey to be in excess of the base assigned to support the same, the company will not be permitted, in the face of an intervening adverse claim, to supply new base to equal the selection, but is restricted to the amount of land to which it is entitled upon the base assigned.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.)      *Land Office, September 23, 1910.*      (J. R. W.)

The Northern Pacific Railway Company appealed from your decision of May 2, 1910, restricting the company's selection to approximately 640 acres, and rejecting it as to the excess in sections 4, 5 and 6, T. 11 S., R. 14 E., W. M., Portland, Oregon.

December 30, 1899, the Northern Pacific Railroad, now Railway, Company selected the unsurveyed lands described as all of what will be sections 4, 5 and 6, T. 11 S., R. 4 E., each containing 640 acres, in

lieu of land relinquished by the company under act of March 2, 1899 (30 Stat., 993), based on sections 29, 31 and 33, T. 17 N., R. 14 W., 640 acres each.

Survey of the selected land was approved by the surveyor-general February 5, 1909, but is not yet accepted and approved by you. That survey shows that sections 4, 5 and 6 contain respectively 991, 987.4 and 940.53 acres, there being an excess in the north half of the sections. After selection by the railway company July 1, 1909, J. H. Bagley, attorney in fact for Deering, applied to select lots 1 to 8 inclusive, in each of said sections under act of July 1, 1898 (30 Stat., 597, 620), as extended by the act of May 17, 1906 (34 Stat., 197). The local office rejected these applications for conflict with the previous ones of the company.

You held that the act of March 2, 1899, *supra*, authorized the company to select "an equal quantity of non-mineral public land," and the company, under section 4 of the act, must, within three months after survey of the land, file a new list of selections describing the selected tracts according to the plat of survey; that according to the uniform practice of your office, where an adverse claim intervenes between selection and the survey, the company is restricted to the amount of land which it is entitled to upon the base surrendered. There was no error in your so holding. All right the company obtained was limited to approximately the same area as the base surrendered. If on survey the land selected proved to be not approximately equal to the area of the base there is nothing to support the selection as to such excess, and in face of an intervening right it is not proper to allow the company to make in effect a new selection by surrender of new base adequate thereto.

Your decision is affirmed.

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#### RESIDENCE WHILE LAND IS NOT SUBJECT TO ENTRY.

##### INSTRUCTIONS.

Credit for residence will not be allowed during the time the land is not subject to entry by the person maintaining the residence.

*First Assistant Secretary Pierce to the Commissioner of the General*  
(F. W. C.)      *Land Office, September 24, 1910.*      (S. W. W.)

The Department has received and carefully considered your office letter of September 1, 1910, inviting attention to a case recently decided by the United States Circuit Court of Appeals for the eighth circuit, *United States v. Bagnell Timber Company* (178 Fed. Rep., 795), wherein it is held that a homestead entryman can not lawfully

be accorded credit for residence, by reason of occupation of lands during a time prior to his entry and while such lands are embraced in the pre-existing entry of another person.

It is stated in your letter that while the Department has never clearly and explicitly authorized any practice by which such a period of trespassing occupation might be accounted for and computed in as a part of the residence and cultivation required by the homestead laws, nevertheless, such a practice has obtained in your office on the authority of the decision of the Department in the case of *McDonald v. Jaramilla* (10 L. D., 276). It is suggested in your letter that careful examination of the decision in the *Jaramilla* case does not disclose the announcement of any principle sufficiently broad to justify the course of procedure which has obtained in your office; that the facts in that case were wholly exceptional and the rule announced there was expressly confined to lands of which the entryman had never been in possession, and to which no claim had ever been asserted on the ground; that even as thus restricted, the rule is not beyond justifiable criticism, and in view of the apparent opposition between the principle announced by the Circuit Court of Appeals in the case cited, and that which has been so doubtfully applied in the practice of your office, the instructions of the Department are desired.

Your office recommends that the rule be confined strictly to cases of the character of *McDonald v. Jaramilla*, or entirely disregarded as being no longer considered by the Department as a correct rule of administration.

The decision in the case of the *United States v. Bagnell Timber Company* has been examined, and there seems to be no doubt as to its soundness. However, in that case a trespasser endeavored to claim immunity because of the fact that at the time of the trespass the land was occupied by a squatter who subsequently made entry of the land and received a patent therefor. The court held, among other things, that the settler who subsequently received the patent was not entitled to credit for residence during the time of his occupancy of the land, while the land was embraced in the pre-existing entry of another. Moreover, there is nothing in the reported case to show that the trespasser claimed to have acted under the authority of the settler upon the land, who subsequently received the patent.

The entire matter considered the Department is disposed to lay down merely the general rule that credit for residence should not be allowed during the time that the land is not subject to entry by the person maintaining such residence, and with this announcement the Department prefers to adjudicate the several cases that may subsequently arise upon the material facts of each particular case.

**SUGGESTIONS TO HOMESTEADERS AND PERSONS DESIRING TO MAKE  
HOMESTEAD ENTRIES.**

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., September 24, 1910.*

1. Persons desiring to make homestead entries should first fully inform themselves as to the character and quality of the lands they desire to enter, and should in no case apply to enter until they have visited and fully examined each legal subdivision for which they make application, as satisfactory information as to the character and occupancy of public lands can not be obtained in any other way.

As each applicant is required to swear that he is well acquainted with the character of the land described in his application, and as all entries are made subject to the rights of prior settlers, the applicant can not make the affidavit that he is acquainted with the character of the land, or be sure that the land is not already appropriated by a settler, until after he has actually inspected it.

Information as to whether a particular tract of land is subject to entry may be obtained from the register or receiver of the land district in which the tract is located, either through verbal or written inquiry, but these officers must not be expected to give information as to the character and quality of unentered land or to furnish extended lists of lands subject to entry, except through plats and diagrams which they are authorized to make and sell as follows:

For a township diagram showing entered land only-----	\$1.00
For a township plat showing form of entries, names of claimants, and character of entries-----	2.00
For a township plat showing form of entries, names of claimants, character of entry, and number-----	3.00
For a township plat showing form of entries, names of claimants, character of entry, number, and date of filing or entry, together with topography, etc-----	4.00

Purchasers of township diagrams are entitled to definite information as to whether each smallest legal subdivision, or lot, is vacant public land. Registers and receivers are therefore required in case of an application for a township diagram showing vacant lands, to plainly check off with a cross, every lot or smallest legal subdivision in the township which is not vacant, leaving the vacant tracts unchecked. There is no authority for registers and receivers to charge and receive a fee of 25 cents for plats and diagrams of a section or part of a section of a township.

If because of the pressure of current business relating to the entry of lands registers and receivers are unable to make the plats or dia-



grams mentioned above, they may refuse to furnish the same and return the fee to the applicant, advising him of their reason for not furnishing the plats requested, that he may make the plats or diagrams himself, or have same made by his agent or attorney, and that he may have access to the plats and tract books of the local land office for this purpose, provided such use of the records will not interfere with the orderly dispatch of the public business.

A list showing the general character of all the public lands remaining unentered in the various counties of the public-land States on the 30th day of the preceding June may be obtained at any time by addressing "The Commissioner of the General Land Office, Washington, D. C."

All blank forms of affidavits and other papers needed in making application to enter or in making final proofs can be obtained by applicants and entrymen from the land office for the district in which the land lies.

2. *Kind of land subject to homestead entry.*—All unappropriated surveyed public lands adaptable to any agricultural use are subject to homestead entry if they are not mineral or saline in character and are not occupied for the purposes of trade or business and have not been embraced within the limits of any withdrawal, reservation, or incorporated town or city; but homestead entries on lands within certain areas (such as lands in Alaska, lands withdrawn under the reclamation act, certain ceded Indian lands, lands within abandoned military reservations, agricultural lands within national forests, lands in western and central Nebraska, and lands withdrawn, classified, or valuable for coal) are made subject to the particular requirements of the laws under which such lands are opened to entry. None of these particular requirements are set out in these suggestions, but information as to them may be obtained by either verbal or written inquiries addressed to the register and receiver of the land office of the district in which such lands are situated.

#### HOW CLAIMS UNDER THE HOMESTEAD LAW ORIGINATE.

3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind.

4. *Settlements may be made under the homestead laws* by all persons qualified to make either an original or a second homestead entry, as explained in paragraphs 6 and 13, and in order to make settlement a settler must personally go upon and improve or establish residence on the land he desires. By making settlement in this way the settler

gains the right to enter the land settled upon as against all other persons, but not as against the Government should the land be withdrawn by it for other purposes.

A settlement made on any part of a surveyed technical quarter section gives the settler the right to enter all of that quarter section which is then subject to settlement, although he may not place improvements on each 40-acre subdivision; but if the settler desires to initiate a claim to surveyed tracts which form a part of more than one technical quarter section he should perform some act of settlement—that is, make some improvement—on each of the smallest legal subdivisions desired. When settlement is made on unsurveyed lands, the settlers must plainly mark the boundaries of all the lands claimed by him.

The settlement must be made by the settler in person, and can not be made by his agent, and each settler must, within a reasonable time after making his settlement, establish and thereafter continuously maintain an actual residence on the land, and if he fails to do this, or, in case of his death, his widow, heirs, or devisees fail to continue cultivation or residence, or if he, or his widow, heirs, or devisees, fail to make entry within three months from the time he first settles on surveyed land, or within three months from the filing in the local land office of the plat of survey of unsurveyed lands on which he made settlement, the right of making entry of the lands settled on will be lost in case of an adverse claim, and the land will become subject to entry by the first qualified applicant.

5. *Soldiers' and sailors' declaratory statements* may be filed in the land office for the district in which the lands desired are located by any persons who have been honorably discharged after ninety days' service in the army or navy of the United States during the war of the rebellion or during the Spanish-American war or the Philippine insurrection. Declaratory statements of this character may be filed either by the soldier or sailor in person or through his agent acting under a proper power of attorney, but the soldier or sailor must make entry of the land in person, and not through his agent, within six months from the filing of his declaratory statement, or he may make entry in person without first filing a declaratory statement if he so chooses. If a declaratory statement is filed by a soldier or sailor in person, it must be executed by him before one of the officers mentioned in paragraph 16, in the county or land district in which the land is situated; if filed through an agent, the affidavit of the agent must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer using a seal and authorized to administer oaths and not necessarily within the county or land district in which the land is situated.

## BY WHOM HOMESTEAD ENTRIES MAY BE MADE.

6. Homestead entries may be made by any person who does not come within either of the following classes:

- (a) Married women, except as hereinafter stated.
- (b) Persons who have already made homestead entry, except as hereinafter stated.
- (c) Foreign-born persons who have not declared their intention to become citizens of the United States.
- (d) Persons who are the owners of more than 160 acres of land in the United States.
- (e) Persons under the age of 21 years who are not the heads of families, except minors who make entry as heirs, as hereinafter mentioned, or who have served in the army or navy during the existence of an actual war for at least fourteen days.
- (f) Persons who have acquired title to or are claiming under any of the agricultural public-land laws, through settlement or entry made since August 30, 1890, any other lands which, with the lands last applied for, would amount in the aggregate to more than 320 acres. See, however, modification hereof in the regulations concerning enlarged homestead entries under the act of February 19, 1909 (par. 52).

7. *A married woman*, who has all of the other qualifications of a homesteader, may make a homestead entry under any one of the following conditions:

- (a) Where she has been actually deserted by her husband.
- (b) Where her husband is incapacitated by disease or otherwise from earning a support for his family and the wife is really the head and main support of the family.
- (c) Where the husband is confined in a penitentiary and she is actually the head of the family.
- (d) Where the married woman is the heir of a settler or contestant who dies before making entry.
- (e) Where a married woman made improvements and resided on the lands applied for before her marriage, she may enter them after marriage if her husband is not holding other lands under an unperfected homestead entry at the time she applies to make entry.

8. *If an entryman deserts his wife* and abandons the land covered by his entry, his wife then has the exclusive right to contest the entry if she has continued to reside on the land, and on securing its cancellation she may enter the land in her own right; or she may continue her residence and make proof in the name of and as the agent for her husband, and patent will issue to him.

9. *If an entryman deserts his minor children* and abandons his entry after the death of his wife, the children have the same rights the wife could have exercised had she been deserted during her lifetime.

10. *The marriage of the entrywoman after making entry* will not defeat her right to acquire title if she continues to reside upon the land and otherwise comply with the law. A husband and wife can not, however, maintain separate residences on homestead entries held by each of them, and if, at the time of marriage, they are each holding an unperfected entry on which they must reside in order to acquire title, they can not hold both entries. In such case they may elect which entry they will retain, and relinquish the other.

11. *A widow*, if otherwise qualified, may make a homestead entry notwithstanding the fact that her husband made an entry, and notwithstanding she may be at the time claiming the unperfected entry of her deceased husband.

12. *A person serving in the army or navy of the United States* may make a homestead entry if some member of his family is residing on the lands applied for, and the application and accompanying affidavits may be executed before the officer commanding the branch of the service in which he is engaged.

13. *Second homestead entries* may be made by the following classes of persons, if they are otherwise qualified to make entry:

(a) By a former entryman who commuted his entry prior to June 5, 1900.

(b) By a homestead entryman who, prior to May 17, 1900, paid for lands to which he would have been afterwards entitled to receive patent without payment, under the "free-homes act."

(c) By any person who for any cause lost, forfeited, or abandoned his homestead entry before February 8, 1908, if the former entry was not canceled for fraud or relinquished for a valuable consideration. Where an entryman sells his improvements on the land and relinquishes his entry in connection therewith, or if he receives the amount of his filing fees or any other amount, it is held that he relinquishes for a valuable consideration.

(d) By persons whose original entries have failed because of the discovery subsequent to entry of obstacles which could not have been foreseen and which render it impracticable to cultivate the land, or because, subsequent to entry, the land becomes useless for agricultural purposes through no fault of the entryman. There is no specific statute authorizing the making of second entries in these classes of cases, and such entries are allowed under the general equitable power of the land department to grant relief in cases of accident and mistake.

(e) Any person who has already made final proof for less than 160 acres under the homestead laws may, if he is otherwise qualified, make a second or additional entry for such an amount of public land as will, when added to the amount for which he has already made

proof, not exceed in the aggregate 160 acres. See, however, instructions under the enlarged homestead act (par. 52).

Any person desiring to make a second entry must first select and inspect the lands he intends to enter and then make application therefor on blanks furnished by the register and receiver. Each application must state the date and number of his former entry and the land office at which it was made, or give the section, township, and range in which the land entered was located. Any person mentioned in paragraph (c) above must show, by the oaths of himself and some other person or persons, the time when his former entry was lost, forfeited, or abandoned, and that it was not canceled for fraud or abandoned or relinquished for a valuable consideration.

Any person mentioned in paragraph (d) above must, in addition to the above evidence as to date and description of his former entry, date of abandonment, and receipt of no consideration, show, by duly corroborated affidavit, the grounds on which he seeks relief, and that he used due diligence prior to entry to avoid any mistake.

14. *An additional homestead entry* may be made by a person for such an amount of public lands adjoining lands then held and resided upon by him under his original entry as will, when added to such adjoining lands, not exceed in the aggregate 160 acres. An entry of this kind may be made by any person who has not acquired title to and is not, at the date of his application, claiming under any of the agricultural public land laws, through settlement or entry made since August 30, 1890, any other lands which, with the land then applied for, would exceed in the aggregate 320 acres, but the applicant will not be required to show any of the other qualifications of a homestead entryman. See, however, instructions under the enlarged homestead act (par. 50).

15. *An adjoining farm entry* may be made for such an amount of public lands lying contiguous to lands owned and resided upon by the applicant as will not, with the lands so owned and resided upon, exceed in the aggregate 160 acres; but no person will be entitled to make entry of this kind who is not qualified to make an original homestead entry. A person who has made one homestead entry, although for a less amount than 160 acres, and perfected title thereto is not qualified to make an adjoining farm entry.

#### HOW HOMESTEAD ENTRIES ARE MADE.

16. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose and sworn to before either the register or the receiver, or before a United States commissioner, or a United States court com-

missioner, or a judge, or a clerk of a court of record, in the county or parish in which the land lies, or before any officer of the classes named who resides in the land district and nearest and most accessible to the land, although he may reside outside of the county in which the land is situated.

17. *Each application to enter and the affidavits accompanying it must recite all the facts necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; that the application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof; that the application is not made for the purpose of speculation, but in good faith to obtain a home for the applicant, and that the applicant has not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person or persons, corporation, or syndicate whatsoever by which the title he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself.*

18. *All applications to make second homestead entries must, in addition to the facts specified in the preceding paragraph, show the number and date of the applicant's original entry, the name of the land office where the original entry was made, and the description of the land covered by it, and it should state fully all of the facts which entitle the applicant to make a second entry.*

19. *All applications by persons claiming as settlers must, in addition to the facts required in paragraph 17, state the date and describe the acts of settlement under which they claim a preferred right of entry, and applications by the widows, devisees, or heirs of settlers must state facts showing the death of the settler and their right to make entry; that the settler was qualified to make entry at the time of his death, and that the heirs or devisees applying to enter are citizens of the United States, or have declared their intentions to become such citizens, but they are not required to state facts showing any other qualifications of a homestead entryman, and the fact that they have made a former entry will not prevent them from making an entry as such heirs or devisees, nor will the fact that a person has*

made entry as the heir or devisee of the settler prevent him from making an entry in his own individual right, if he is otherwise qualified to do so.

20. *All applications by soldiers, sailors, or their widows*, or the guardians of their minor children should be accompanied by proper evidence of the soldier's or sailor's service and discharge, and of the fact that the soldier or sailor had not, prior to his death, made an entry in his own right. The application of the widow of the soldier or sailor must also show that she is unmarried, and that the right has not been exercised by any other person. Applications for the children of soldiers or sailors must show that the father died without having made entry, that the mother died or remarried without making entry, and that the person applying to make entry for them is their legally appointed guardian.

RIGHTS OF WIDOWS, HEIRS, OR DEVISEES UNDER THE HOMESTEAD LAWS.

21. *If a homestead settler dies* before he makes entry, his widow has the exclusive right to enter the lands covered by his settlement, and if there be no widow, then any person to whom he has devised his settlement rights by proper will has the exclusive right to make the entry; but if the settler dies leaving neither widow nor will, then the right to enter the lands covered by his settlement passes to the persons who are named as his heirs by the laws of the State in which the land lies. The persons to whom the settler's right of entry passes must make entry within the time named in paragraph 4 or they will forfeit their right to the next qualified applicant. They may, however, make entry after that time if no adverse claim has attached.

22. *If a homestead entryman dies before making final proof* his rights under his entry will pass to his widow; or if there be no widow, and the entryman's children are all minors, the right to a patent vests in them upon making publication of notice and proof of the death of the entryman without a surviving widow, that they are the only minor children and that there are no adult heirs of the entryman, or the land may be sold for the benefit of such minor children in the manner in which other lands belonging to minors are sold under the laws of the State or Territory in which the lands are located.

If the children of a deceased entryman are not all minors and his wife is dead, his rights under his entry pass to the person to whom such rights were devised by the entryman's will, or if an entryman dies without leaving either a widow or a will, and his children are not all minors, his rights under his entry will pass to the persons who are his heirs under the laws of the State or Territory in which the lands are situated.

23. *If a contestant dies* after having secured the cancellation of an entry his right as a successful contestant to make entry passes to his

heirs; and if the contestant dies before he has secured the cancellation of the entry he has contested, his heirs may continue the prosecution of his contest and make entry if they are successful in the contest. In either case to entitle the heirs to make entry they must show that the contestant was a qualified entryman at the date of his death; and in order to earn a patent the heirs must comply with all the requirements of the law under which the entry was made to the same extent as would have been required of the contestant had he made entry.

*No foreign-born persons can claim rights as heirs under the homestead laws unless they have become citizens of the United States or have declared their intentions to become citizens.*

24. *The unmarried widow, or, in case of her death or remarriage, the minor children of soldiers and sailors* who were honorably discharged after ninety days' actual service during the war of the rebellion, the Spanish-American war, or the Philippine insurrection may make entry as such widow or minor children if the soldier or sailor died without making entry. The minor children must make a joint entry through their duly appointed guardian.

#### RESIDENCE AND CULTIVATION.

25. *The residence and cultivation required by the homestead law* means a continuous maintenance of an actual home on the land entered, to the exclusion of a home elsewhere, and continuous annual cultivation of some portion of the land. A mere temporary sojourn on the land, followed by occasional visits to it once in six months or oftener, will not satisfy the requirements of the homestead law, and may result in the cancellation of the entry.

26. *No specific amount of either cultivation or improvements is* required where entry is made under the general homestead law, but there must in all cases be such continuous improvement and such actual cultivation as will show the good faith of the entryman. Lands covered by such a homestead entry may be used for grazing purposes if they are more valuable for pasture than for cultivation to crops. When lands of this character are used for pasturage, actual grazing will be accepted in lieu of actual cultivation. The fact that lands covered by homesteads are of such a character that they can not be successfully cultivated or pastured will not be accepted as an excuse for failure to either cultivate or graze them.

*Homestead entries for coal lands.*—Where homestead entry is made under the act of June 22, 1910 (36 Stat., 583), for land which has been withdrawn or classified as coal land, or which is valuable for coal, the entryman must show improvements as above stated and must further comply with the requirements of the enlarged homestead act of February 19, 1909 (35 Stat., 639), as to residence and cultivation; that is, he must cultivate at least one-eighth of the area



of the entry to agricultural crops other than native grasses, beginning with the second year of the entry, and at least one-fourth of the area of the entry beginning with the third year of the entry and continuing to the date of proof. Entries in this class can not be commuted. (See par. 51.)

27. *Actual residence on the lands entered must begin within six months* from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases hereafter mentioned; but all entrymen who actually resided upon and cultivated lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years' residence and cultivation.

Under certain circumstances, leaves of absence may be granted in the manner pointed out in paragraph 36 of these suggestions, but the entryman can not claim credit for residence during the time he is absent under such leave.

*An extension of time for establishing residence* can be granted only in cases where the entryman is actually prevented by climatic hindrances from establishing his residence within the required time. This extension can not be granted in advance; but on making final proof or in case a contest is instituted against the entry the entryman may show the storms, floods, blockades of snow or ice, or other climatic reasons which rendered it impossible for him to commence residence within six months from date of entry, and he must as soon as possible after the climatic hindrances disappear establish his residence on the land entered. Failure to establish residence within six months from date of entry will not necessarily result in a forfeiture of the entry, provided the residence be established prior to the intervention of an adverse claim.

*After an entryman has fully complied with the law* and has submitted proof he is no longer required to live on the land. But all entrymen should understand that if they discontinue their residence on the land prior to the issuance of patent they do so at their risk, and by so doing they may place themselves in such a position that they may be unable to comply with requirements made by the General Land Office, should their proof on examination there be found unsatisfactory.

28. *Residence and cultivation by soldiers and sailors* of the classes mentioned in paragraph 5 must begin within six months from the time they file their declaratory statements regardless of the time when they make entry under such statement, but if they make entry without filing a declaratory statement they must begin their residence within six months from the date of such entry, and residence

thus established must continue in good faith, with improvements and annual cultivation for at least one year, but after one year's residence and cultivation the soldier or sailor is entitled to credit on the remainder of the five-year period for the term of his actual naval or military service, or if he was discharged from the army or navy because of wounds received or disabilities incurred in the line of duty he is entitled to credit for the whole term of his enlistment. No credit can be allowed for military service where commutation proof is offered.

29. *A soldier or sailor making entry during his enlistment* in time of peace is not required to reside personally on the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is five years old or until it has been commuted; but a soldier or sailor is not entitled to credit on account of his military service in time of peace. And if such soldier has no family, there is no way by which he can make entry and acquire title during his enlistment in time of peace.

30. *Widows and minor orphan children of soldiers and sailors* who make entry as such widows and children must begin their residence and cultivation of the lands entered by them within six months from the dates of their entries, or the filing of declaratory statement, and thereafter continue both residence and cultivation for such period as will, when added to the time of their husbands' or fathers' military or naval service, amount to five years from the date of the entry, and if the husbands or fathers either died in the service or were discharged on account of wounds or disabilities incurred in the line of duty, credit for the whole term of their enlistment, not to exceed four years, may be taken, but no patent will issue to such widows or children until there has been residence and cultivation by them for at least one year. No credit can be allowed for military service where commutation proof is offered.

31. *Persons who make entry as heirs of settlers* are not required to both reside upon and cultivate the land entered by them, but they must, within six months from the dates of their entries, begin and thereafter continuously maintain either residence or cultivation on the land entered by them for such a period of time as, added to the time during which the settler resided on and cultivated the land, will make five years, unless their entries be sooner commuted. Commutation proof can not, however, be made unless at least fourteen months' actual residence is shown, performed either by the settler or the heirs or in part by the settler and in part by the heirs.

32. *The widow, heirs, or devisees of a homestead entryman* who dies before he earns patent are not required to both reside upon and cultivate the lands covered by his entry, but they must, within six months after the death of the entryman, begin either residence or cul-

tivation on the land covered by the entry, and thereafter continuously maintain either residence or cultivation for such a period of time as will, when added to the time during which the entryman complied with the law, amount in the aggregate to the required five years, unless they sooner commute the entry. But commutation proof can not be made unless fourteen months' actual residence can be shown, performed by the entryman or by the widow, heirs, or devisees, or in part by the entryman and in part by the widow, heirs, or devisees.

33. *Homestead entrymen who have been elected* to either a federal, state, or county office, after they have made entry and established an actual residence on the land covered by their entries are not required to continue such residence during their term of office, if the discharge of their bona fide official duties necessarily requires them to reside elsewhere than upon the land; but they must continue their cultivation and improvements for the required length of time. Such an officeholder can not commute, however, unless he can show at least fourteen months' actual residence. See circulars of February 16 and 20, 1909 (37 L. D., 449), and October 18, 1907 (36 L. D., 124).

A person who makes entry after he has been elected to office is not excused from maintaining residence, but must comply with the law in the same manner as though he had not been elected.

34. *Residence is not required* on land covered by an adjoining farm entry of the kind mentioned in paragraph 15; but a person who makes an adjoining farm entry is not entitled to a patent until he has continued his residence and cultivation for the full five years on the land owned by him at the time he made entry, or on the adjoining lands entered by him, unless he commutes his entry after fourteen months' residence on either the entered lands or the lands originally owned by him; in neither case can credit be claimed for residence on the original farm prior to the date of the adjoining farm entry.

A person who has made an additional entry of the kind mentioned in paragraph 14 for lands adjoining his original entry is not entitled to patent for the lands so entered until he can show five years' residence, either on the original entry or in part on the original and in part on the additional. No commutation of the additional entry is allowed by law in the latter case.

35. *Neither residence nor cultivation by an insane homestead entryman* is necessary after he becomes insane; if such entryman made entry and established residence before he became insane and complied with the requirements of the law up to the time his insanity began.

#### LEAVES OF ABSENCE.

36. Leaves of absence for one year or less may be granted to entrymen who have established actual residence on the lands entered by them in all cases where total or partial failure or destruction of crops,

sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent upon him by a cultivation of the land.

Applications for leaves of absence should be addressed to the register and receiver of the land office where the entry was made and should be sworn to by the applicant and some other disinterested person before such register and receiver or before some officer in the land district using a seal and authorized to administer oaths, except in cases where, through age, sickness, or extreme poverty, the entryman is unable to visit the district for that purpose, when the oath may be made outside of the land district. All applications of this kind should clearly set forth:

(a) The number and date of the entry, a description of the lands entered, the date of the establishment of his residence on the land, and the extent and character of the improvements and cultivation made by the applicant.

(b) The kind of crops which failed or were destroyed and the cause and extent of such failure or destruction.

(c) The kind and extent of the sickness, disease, or injury assigned, and the extent to which the entryman was prevented from continuing his residence upon the land, and, if practicable, a certificate signed by a reliable physician as to such sickness, disease, or injury, should be furnished.

(d) The character, cause, and extent of any unavoidable casualty which may be made the basis of the application.

(e) The dates from which and to which the leave of absence is requested.

#### COMMUTATION OF HOMESTEAD ENTRIES.

37. All original, second, and additional homestead, and adjoining farm entries may be commuted, except such entries as are made under particular laws which forbid their commutation.

Where there has been immediately prior to the application to submit proof on a homestead entry at least fourteen months' actual and substantially continuous residence, accompanied by improvement and cultivation, the entryman, or his widow, heirs, or devisees, may obtain patent by proving such residence, improvement, and cultivation, and paying the cost of such proof, the land-office fees, and the price of the land, which is \$1.25 per acre outside the limits of railroad grants, and \$2.50 per acre for lands within the granted limits, except as to certain lands which were opened under statutes requiring payment of a price different from that here mentioned. See circular of October 18, 1907 (36 L. D., 124).

*Commutation proof can not be made on homestead entries allowed under the act of April 28, 1904 (33 Stat., 547), known as the Kinkaid*

act; entries under the Reclamation Act of June 17, 1902 (32 Stat., 388); entries under the enlarged homestead act (post par. 46 et seq.); entries allowed for coal lands under the act of June 22, 1910 (36 Stat., 583), so long as the land is withdrawn or classified as coal; additional entries allowed under the act of April 28, 1904 (33 Stat., 527); second entries allowed under the act of June 5, 1900 (31 Stat., 267); or second entries allowed under the act of May 22, 1902 (32 Stat., 203), when the former entry was commuted.

#### HOMESTEAD FINAL AND COMMUTATION PROOF.

38. Either final or commutation proof may be made at any time when it can be shown that residence and cultivation have been maintained in good faith for the required length of time, but if final proof is not made within seven years from the date of a homestead entry the entry will be canceled unless some good excuse for the failure to make the proof within the seven years is given with satisfactory final proof as to the required residence and cultivation made after the expiration of the seven years.

39. *By whom proof may be offered.*—Final proof must be made by the entrymen themselves, or by their widows, heirs, or devisees, and can not be made by their agents, attorneys in fact, administrators, or executors, except in the cases hereinafter mentioned. In order to submit final five-year proof the entryman, his widow, or the heir or devisee submitting proof must be a citizen of the United States. As a general rule commutation proof may be submitted by one who has declared his or her intention to become a citizen, but on entries made for land in certain reservations opened under special acts the person submitting commutation proof must be a citizen of the United States.

(a) If an entryman becomes insane after making his entry and establishing residence, patent will issue to the entryman on proof by his guardian or legal representative that the entryman had complied with the law up to the time his insanity began. In such a case if the entryman is an alien and has not been fully naturalized evidence of his declaration of intention to become a citizen is sufficient.

(b) If a person has made a homestead entry and afterwards died while he was serving as a soldier or a sailor during the Spanish-American war or the Philippine insurrection, patent will issue upon proof made by his widow, if unmarried, or in case of her death or marriage then his minor orphan children, or his, her, or their legal representatives.

(c) Where entries have been made for minor orphan children of soldiers or sailors, proof may be offered by their guardian, if any, if the children are still minors at the time the proof should be made.

(d) When an entryman has abandoned the land covered by his entry and deserted his wife, she may make final or commutation

proof as his agent, or, if his wife be dead and the entryman has deserted his minor children, they may make the same proof as his agent, and patent will issue in the name of the entryman.

(e) When an entryman dies leaving children, all of whom are minors, and both parents are dead, the executor or administrator of the entryman, or the guardian of the children, may, at any time within two years after the death of the surviving parent, sell the land for the benefit of the children by proper proceedings in the proper local court, and patent will issue to the purchaser; but if the land is not so sold patent will issue to the minors upon proof of death, heirship, and minority being made by such administrator or guardian.

40. *How proofs may be made.*—Final or commutation proofs may be made before any of the officers mentioned in paragraph 16, as being authorized to administer oaths to applicants.

Any person desiring to make homestead proofs should first forward a written notice of his desire to the register and receiver of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

41. *Publication fees.*—Applicants shall hereafter be required to make their own contracts for publishing notice of intention to make proof, and they shall make payment therefor directly to the publishers, the newspaper being designated and the notice prepared by the register.

42. *Duty of officers before whom proofs are made.*—On receipt of the notice mentioned in the preceding paragraph, the register will issue a notice naming the time, place, and officer before whom the proof is to be made and cause the same to be published once a week for five consecutive weeks in a newspaper of established character and general circulation published nearest the land, and also post a copy of the notice in a conspicuous place in his office.

On the day named in the notice the entryman must appear before the officer designated to take proof with at least two of the witnesses named in the notice; but if for any reason the entryman and his witnesses are unable to appear on the date named, the officer should continue the case from day to day until the expiration of ten days, and the proof may be taken on any day within that time when the entryman and his witnesses appear, but they should, if it is at all possible to do so, appear on the day mentioned in the notice. Entrymen are advised that they should, whenever it is possible to do so, offer their proofs before the register or receiver, as it may be found necessary to refer all proofs made before other officers to a special agent for

investigation and report before patent can issue, while, if the proofs are made before the register or receiver, there is less likelihood of this being done, and there is less probability of the proofs being incorrectly taken. By making proof before the register or receiver the entrymen will also save the fees which they are required to pay other officers, as they will be required under the law to pay the register and receiver the same amount of fees in each case, regardless of the fact that the proof may have been taken before some other officer.

Entrymen are cautioned against improvidently and improperly commuting their entries, and are warned that any false statement made in either their commutation or final proof may result in their indictment and punishment for the crime of perjury.

43. *Fees and commissions.*—When a homesteader applies to make entry he must pay in cash to the receiver a fee of \$5 if his entry is for 80 acres or less, or \$10 if he enters more than 80 acres. And in addition to this fee he must pay, both at the time he makes entry and final proof, a commission of \$1 for each 40-acre tract entered outside of the limits of a railroad grant and \$2 for each 40-acre tract entered within such limits. Fees under the enlarged homestead act are the same as above, but the commissions are based upon the area of the land embraced in the entry (see par. 48). On all final proofs made before either the register or receiver, or before any other officer authorized to take proofs, the register and receiver are entitled to receive 15 cents for each 100 words reduced to writing, and no proof can be accepted or approved until all fees have been paid.

In all cases where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming the commission due to the register and receiver on entries and final proofs, and the testimony fees under final proofs, are 50 per cent more than those above specified, but the entry fee of \$5 or \$10, as the case may be, remains the same in all the States.

United States commissioners, United States court commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive \$1 for administering the oath to each entryman and each final proof witness to final proof testimony, which has been reduced to writing by them.

44. *The alienation of all or any part of the land* embraced in a homestead prior to making proof, except for the public purposes mentioned in section 2288, Revised Statutes, will prevent the entryman from making satisfactory proof, since he is required to swear that he has not alienated any part of the land except for the purposes mentioned in section 2288, Revised Statutes.

A mortgage by the entryman prior to final proof for the purpose of securing money for improvements, or for any other purpose not inconsistent with good faith, is not considered such an alienation of the land as will prevent him from submitting satisfactory proof. In such a case, however, should the entry be canceled for any reason prior to patent, the mortgagee would have no claim on the land or against the United States for the money loaned.

*Alienation after proof and before patent.*—The right of a homestead entryman to patent is not defeated by the alienation of all or a part of the land embraced in his entry after the submission of final proof and prior to patent, provided the proof submitted is satisfactory. Such an alienation is, however, at the risk of the entryman, for if the reviewing officers of the land department subsequently find the final proof so unsatisfactory that it must be wholly rejected and new proof required, the entryman can not then truthfully make the nonalienation affidavit required by section 2291, Revised Statutes, and his entry must in consequence be canceled. The purchaser takes no better title than the entryman had, and if the entry is canceled purchaser's title must necessarily fail.

45. *Relinquishments.*—A homestead entryman, or in case of his death, his statutory successor, as explained in paragraph 22, may file a written relinquishment of his entry, and on the filing of such relinquishment in the local land office the land formerly covered by the entry becomes at once subject to entry by the first qualified applicant.

Relinquishments run to the United States alone, and no person obtains any right to the land by the mere purchase of a relinquishment of a filing or entry.

Entries made for the purpose of holding the land for speculation and sale of the relinquishments are illegal and fraudulent. Every effort will be made to prevent such frauds and to detect and punish the perpetrators.

Purchasers of relinquishments of fraudulent filings or entries should understand that they purchase at their own risk so far as the United States is concerned, and they must seek their own remedies under local laws against those who by imposing such relinquishments upon them have obtained their money without valuable consideration.

#### ENLARGED HOMESTEAD ENTRIES.

46. *Kind of land subject to entry.*—The first section of the act of February 19, 1909 (35 Stat., 639), provides for the making of homestead entries for an area of 320 acres, or less, of nonmineral, nontimbered, nonirrigable public land in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, and in the Territories



of Arizona and New Mexico. By the first section of the act approved June 17, 1910 (36 Stat., 531), the same kind of entries are allowed to be made in the State of Idaho.

The terms "arid" or "nonirrigable" land, as used in these acts, are construed to mean land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as "dry farming," and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost.

Therefore lands containing merchantable timber, mineral lands, and lands within a reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply may not be entered under these acts. Minor portions of a legal subdivision susceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under these acts, provided, however, that no one entry shall embrace in the aggregate more than 40 acres of such irrigable lands.

47. *Designation of lands.*—From time to time lists designating the lands which are subject to entry under these acts are sent to the registers and receivers in the States affected, and they are instructed immediately upon the receipt of such lists to note the same upon their tract books. Until such lists have been received by them no applications to enter can be received and no entries allowed under these acts, but after the receipt of such lists it is competent for them to dispose of applications for land embraced therein under the provisions of these acts, in like manner as other applications for public lands.

The fact that lands have been designated as subject to entry is not conclusive as to the character of such lands, and should it afterwards develop that the land is not of the character contemplated by the above acts the designation may be canceled; but where an entry is made in good faith under the provisions of these acts, such designation will not thereafter be modified to the injury of anyone who, in good faith, has acted upon such designation. Each entryman must furnish affidavit as required by section 2 of the acts.

48. *Compactness—Fees.*—Lands entered under the enlarged homestead acts must be in a reasonably compact form and in no event exceed  $1\frac{1}{2}$  miles in length.

The acts provide that the fees shall be the same as those now required to be paid under the homestead laws; therefore, while the fees may not in any one case exceed the maximum fee of \$10 required under the general homestead law, the commissions will be determined by the area of the land embraced in the entry.

49. *Form of application.*—Applications to make entry under these acts must be submitted on forms prescribed by the General Land Office, and in case of an original entry on No. 4-003.

The affidavit of an applicant as to the character of the land must be corroborated by two witnesses. It is not necessary that such witnesses be acquainted with the applicant, and if they are not so acquainted their affidavits should be modified accordingly.

50. *Additional entries.*—Sections 3 of the acts provide that any homestead entrymen of lands of the character described in the first sections of the acts, upon which entry final proof has not been made, may enter such other lands subject to the provisions of the acts, contiguous to the former entry, which shall not, together with the lands embraced in the original entry, exceed 320 acres, and that residence upon and cultivation of the original entry shall be accepted as equivalent to residence upon and cultivation of the additional entry.

These sections contemplate that lands may, subsequent to entry, be classified, or designated, by the Secretary of the Interior as falling within the provisions of these acts, and in such cases an entryman of such lands may, at any time prior to final proof on his original entry, make such additional entry, provided he is otherwise qualified. Applicants for such additional entries must tender the proper fees and commissions, and make application and affidavit on the form prescribed (No. 4-004). Entrymen who have made final proof on their original entries, are not qualified to make additional entries.

51. *Final proof on original and additional entries—Commutation not allowed.*—Final proof must be made as in ordinary homestead cases, and in addition to the showing required of ordinary homestead entrymen it must be shown that at least one-eighth of the area embraced in each entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the third year of the entry and continuing to date of final proof.

Final proof submitted on an additional entry must show that the area of such entry required by the acts to be cultivated has been cultivated in accordance with such requirement; or that such part of the original entry as will, with the area cultivated in the additional entry, aggregate the required proportion of the combined entries, has been cultivated in the manner required by the acts.

Proof must be made on the original entry within the statutory period of seven years from the date of the entry; and if it can not be shown at that time that the cultivation has been such as to satisfy the requirements of the acts as to both entries it will be necessary

to submit supplemental proof on the additional entry at the proper time. But proof should be made at the same time to cover both entries in all cases where the residence and cultivation are such as to meet the requirements of the acts.

Commutation of either original or additional entry, made under these acts, is expressly forbidden.

52. *Right of entry.*—Homestead entries under the provisions of section 2289 of the Revised Statutes, for 160 acres or less, may be made by qualified persons within the States and Territories named upon lands subject to such entry, whether such lands have been designated under the provisions of these acts or not. But those who make entry under the provisions of these acts can not afterwards make homestead entry under the provisions of the general homestead law, nor can an entryman who enters under the general homestead law lands designated as falling within the provisions of these acts afterwards enter any lands under these acts.

A person who has, since August 30, 1890, entered and acquired title to 320 acres of land under the agricultural land laws (which is construed to mean the timber and stone, desert land, and homestead laws), is not entitled to make entry under these acts; neither is a person who has acquired title to 160 acres under the general homestead law entitled to make another homestead entry under these acts, unless entitled to the benefits of section 2 of the act of June 5, 1900 (31 Stat., 267), or section 2 of the act of May 22, 1902 (32 Stat., 203).

If, however, a person is a qualified entryman under the homestead laws of the United States, he may be allowed to enter 320 acres under these acts, or such a less amount as when added to the lands previously entered or held by him under the agricultural land laws shall not exceed in the aggregate 480 acres.

53. *Constructive residence on certain lands in Utah.*—The sixth section of the act of February 19, 1909 (35 Stat., 639), provides that not exceeding 2,000,000 acres of land in the State of Utah, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of that act; with the exception, however, that entrymen of such lands, will not be required to prove continuous residence thereon. This act provides, in such cases, that all entrymen must reside within such distance of the land entered as will enable them successfully to farm the same as required by the act; and no attempt will be made at this time to determine how far from the land an entryman will be allowed to reside, as it is believed that the proper determination of that question will depend upon the circumstances of each case. Applications to enter under section 6 of this act will not be received until lists designating, or classifying, the lands sub-

ject to entry thereunder have been filed and noted in the local land office. Such lists will be from time to time furnished the registers and receivers, who will be instructed to note same on their tract books immediately upon their receipt. Applications under this section must be submitted on Form No. 4-003.

Final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show that, from the date of entry until the time of making final proof, he resided within such distance from said land as enabled him to successfully farm the same. Such proof must also show that not less than one-eighth of the entire area of the land entered was cultivated during the second year, not less than one-fourth during the third year and not less than one-half during the fourth and fifth years after entry.

54. *Constructive residence permitted on certain lands in Idaho.*—The sixth section of the act of June 17, 1910 (36 Stat., 531), provides that not exceeding 320,000 acres of land in the State of Idaho, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of this act, with the exception, however, that entrymen of such lands will not be required to prove continuous residence thereon. This section provides, in such cases, that after six months from date of entry and until final proof, all entrymen must reside not more than 20 miles from the land entered, and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work, unless prevented by sickness, or other unavoidable cause. It is further provided that leaves of absence from the residence established under this section may be granted upon the same terms and conditions as are required from other homestead entrymen.

Applications to enter under this section of this act will not be received until lists designating or classifying the lands subject to entry thereunder have been filed and noted in the local land offices. Such lists will, from time to time, be furnished the registers and receivers, who will be instructed to note the same on their tract books immediately upon their receipt. Applications under this section must be submitted on Form 4-003.

The final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show that, from the expiration of six months after the date of original entry and until the time of making final proof, he resided not more than 20 miles from the land entered and was personally engaged in farming the same, as required by said act. Such proof must also show

that not less than one-eighth of the entire area of the land entered was cultivated during the second year, not less than one-fourth during the third year, and not less than one-half during the fourth and fifth years.

55. *Officers before whom applications and proofs may be made.*—The acts provide that any person applying to enter land under the provisions thereof shall make and subscribe before the proper officer an affidavit, etc. The term "proper officer," as used herein, is held to mean any officer authorized to take affidavits or proof in homestead cases.

FRED DENNETT, *Commissioner*.

Approved, September 24, 1910.

FRANK PIERCE, *Acting Secretary*.

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STATUTES AND REGULATIONS GOVERNING ENTRIES AND PROOFS UNDER  
THE DESERT-LAND LAWS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., September 30, 1910.*

1. The laws, or portions of laws, governing the making of desert-land entries, assignments thereof, and the proofs required, will be found printed in full at the end of this circular, and are as follows: Act of March 3, 1877 (19 Stat., 377); March 3, 1891 (26 Stat., 1095); August 30, 1891 (26 Stat., 391); June 27, 1906 (34 Stat., 519); March 26, 1908 (35 Stat., 48); March 28, 1908 (35 Stat., 52); March 4, 1904, amending section 2294, Revised Statutes of the United States (33 Stat., 59); June 22, 1910 (36 Stat., 583); March 3, 1909 (35 Stat., 844); June 25, 1910 (36 Stat., 867), and the act of June 22, 1910 (36 Stat., 583).

STATES AND TERRITORIES IN WHICH DESERT-LAND ENTRIES MAY BE MADE.

2. The act of March 3, 1877, provided for the making of desert-land entries in the States and Territories of California, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming, Arizona, and New Mexico. The act of March 3, 1891, extended the provisions of the desert-land laws to Colorado.

LANDS THAT MAY BE ENTERED AS DESERT LAND.

3. Lands which, by reason of a lack of rainfall, or of sufficient dampness in the soil, will not produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of

hay in usual seasons, nor produce an agricultural crop of any kind in amount to make the cultivation thereof reasonably remunerative, and do not contain sufficient moisture to produce a natural growth of trees may be classed as desert in character and, if surveyed and unappropriated, may be entered under the desert-land law.

Lands situated within a notoriously arid or desert region, and themselves previously desert within the meaning of the desert-land law, do not necessarily lose their character as desert lands merely because on account of unusual rainfall for a few successive seasons their productiveness was increased and larger crops were raised thereon; and, under such circumstances, a strong preponderance of evidence will be required to take them out of the class of desert lands. The final proof, however, of one who makes desert entry of such lands will be closely scrutinized as to the sufficiency of his water supply and the adequacy of his ditches and laterals. (37 L. D., 522.)

While lands which border upon streams, lakes, and other bodies of water, or through or upon which there is any stream, body of water, or living spring, may not produce agricultural crops without irrigation, such lands are not subject to entry under the desert-land laws until the clearest proof of their desert character is furnished.

#### WHO MAY MAKE A DESERT-LAND ENTRY.

4. Any citizen of the United States, 21 years of age, or any person of that age who has declared his intention of becoming a citizen of the United States, and who can make the affidavit specified in paragraphs 8 and 9 of these regulations, can make a desert-land entry. Thus, a woman, whether married or single, who possesses the necessary qualifications, can make a desert-land entry, and, if married, without taking into consideration any entries her husband may have made.

At the time of making final proof, however, entrymen of alien birth must have been admitted to full citizenship, which must be shown by a duly certified copy of the certificate of naturalization.

#### QUANTITY OF LAND THAT MAY BE ENTERED.

5. Under the act of March 3, 1877, desert-land entries to the maximum of 640 acres were allowed, but by the act of March 3, 1891, the area that may be embraced in a desert entry was reduced to 320 acres as the maximum. This limitation must, however, be read in connection with the act of August 30, 1890 (26 Stats., 391), which limits to 320 acres, in the aggregate, the amount of land to which title may be acquired under all the public land laws, except the mineral laws. Hence, a person having initiated a claim under the homestead, timber and stone, preemption, or other agricultural land laws, or under

all such laws, since August 30, 1890, say, to 160 acres in the aggregate, and acquired title to the land so claimed, or who is claiming such an area under subsisting entries at the date of his desert-land application, if otherwise qualified, may enter 160 acres of land under the desert-land laws. In other words, he may make a desert-land entry for such a quantity of land as, taken together with land acquired by him under the agricultural land laws, since August 30, 1890, and claimed by him under such laws, does not exceed 320 acres in the aggregate. It is to be noted, also, that the act of June 22, 1910 (Public No. 227), provides that desert-land entries made for lands withdrawn or classified as coal lands, or valuable for coal, shall not exceed 160 acres in area.

A person's right of entry under the desert-land law is exhausted either by making an entry or by taking an assignment of an entry, in whole or in part, whether the maximum quantity of land, or less, is entered or received by assignment; except, however, that under the act of March 26, 1908, if a person, prior to the passage of that act, has made an entry and has abandoned, lost, or forfeited the same, or has relinquished without receiving a valuable consideration therefor, such person may make a second entry. In such cases, however, it must be shown when the former entry was abandoned, lost, or forfeited, that it was not assigned, in whole or in part, canceled for fraud, or relinquished for a valuable consideration, and it must be so described by section, township, and range, or by date and number, as to be readily identified on the records of the General Land Office. The showing required must be by affidavit of applicant wherein the facts upon which is based his claim of right to make a second desert-land entry are set forth fully and in detail. This affidavit must be corroborated, as far as possible, by the affidavit of one or more persons having personal knowledge of the facts stated by applicant. Registers and receivers are authorized to allow a second desert-land entry in any case wherein it is shown that applicant is entitled to make such entry under the provisions of said act of March 26, 1908. Otherwise the application will be noted on the district office records and forwarded to the General Land Office with appropriate recommendation.

#### LAND MUST BE IN COMPACT FORM.

6. Land entered under these laws should be in compact form, which means that it should be as nearly a square form as possible. Where, however, it is impracticable on account of the previous appropriation of adjoining lands, or on account of the topography of the country, to take the land in a compact form, all the facts regarding the situation, location, and character of the land sought to be entered, and the surrounding tracts, should be stated, in order

that the General Land Office may determine whether, under all the circumstances, the entry should be allowed in the form sought. Entry-men should make a complete showing in this regard, and should state the facts and not the conclusions they derive from the facts, as it is the province of the Land Department of the Government to determine whether or not, from the facts stated, the entry should be allowed.

#### HOW PREFERENCE RIGHT MAY BE ACQUIRED ON UNSURVEYED LAND.

7. Prior to the act of March 28, 1908, a desert-land entry could embrace unsurveyed lands, but since the date of that act desert-land entries may not be made of unsurveyed lands. This act provides, however, that if a duly qualified person shall go upon a tract of unsurveyed desert land and reclaim, or commence to reclaim, the same, he shall be allowed a preference right of ninety days after the filing of the plat of survey in the local land office to make entry of the land. To preserve this preference right the work of reclamation must be continued up to the filing of the plat of survey, unless the reclamation of the land is completed before that time, and in that event the claimant must continue to cultivate and occupy the land until the survey is completed and the plat filed. A mere perfunctory occupation of the land, such as staking off the claim, or posting notices thereof on the land claimed, would not secure the preference right as against an adverse claimant, but occupation in entire good faith, accompanied by acts and works looking to the ultimate reclamation of the land, are necessary and required.

#### HOW TO PROCEED TO MAKE A DESERT-LAND ENTRY.

8. A person who desires to make entry under the desert-land laws must file with the register and receiver of the proper land office a declaration, or application, under oath, showing that he is a citizen of the United States, or has declared his intention to become such citizen; that he is 21 years of age or over; and that he is also a bona fide resident of the State or Territory in which the land sought to be entered is located. He must also state that he has not previously exercised the right of entry under the desert-land laws by making an entry or by having taken one by assignment; that he has personally examined every legal subdivision of the land sought to be entered; that he has not, since August 30, 1890, acquired title, under any of the agricultural-land laws, to lands which, together with the land applied for, will exceed, in the aggregate, 320 acres; and that he intends to reclaim the lands applied for, by conducting water thereon, within four years from the date of his application. This declaration must contain a description of the land, by legal subdivisions, section, township, and range.



9. Special attention is called to the terms of this application, as they require a personal knowledge by the entryman of the lands intended to be entered. The affidavit, which is made a part of the application, may not be made by an agent or upon information and belief, and the register and receiver must reject all applications in which it is not made to appear that the statements contained therein are made upon the applicant's own knowledge and that it was obtained from a personal examination of the lands. The blank spaces in the application must be filled in with a complete statement of the facts, showing the applicant's acquaintance with the land and how he knows it to be desert land. This declaration must be corroborated by the affidavits of two reputable witnesses, who also must be personally acquainted with the land, and they must state the facts regarding the condition and situation of the land upon which they base the opinion that it is subject to desert entry.

The statements in the blank form of declaration and accompanying affidavits, as to present character of the land, may be modified so as to show the facts, in any case wherein application is made for entry of lands reclaimed, or partially reclaimed, by applicant, before survey, under the provisions of the act of March 28, 1908; as to a former entry, in case application is made for a second entry under the provisions of the act of March 26, 1908, and as to the character of the land, with respect to coal deposits in case application is made, under the provisions of the act of June 22, 1910, for lands withdrawn or classified as coal lands, or valuable for coal.

10. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their post-office addresses. It is not sufficient to name only the county or State in which a person lives, but the town or city must be named also, and where the residence is in a city, the street and number must be given. It is especially important to claimants that upon changing their post-office addresses they promptly notify the local officers of such change, for upon failure to do so their entries may be canceled upon notice sent to the address of record, but not received by claimant. The register and receiver will be careful to note the post-office address on their records.

11. The application and corroborating affidavits, and all other proofs, affidavits, and oaths of any kind whatsoever, required by law to be made by applicants and entrymen and their corroborating witnesses, must be sworn to before the register or receiver of the land district in which the land is located, or before a United States commissioner, if the lands are within the boundaries of a State, or a commissioner of a court exercising federal jurisdiction, if in a Territory, or before a judge or clerk of a court of record, in the county, or

land district, in which the land is situated. The only conditions permitting the taking of such evidence outside the proper land district is where the county in which the land is situated lies partly in two or more land districts, in which case such evidence may be taken anywhere in the county. In case the application and affidavits are not made before either of the local officers, or in the county in which the land is located, they must be made before some one of the officers above named, in the land district nearest to, or most accessible from, the land, which latter fact must be shown by affidavit of applicant. The declaration of applicant and the affidavits of his two witnesses must, in every instance, be made at the same time and place and before the same officer.

12. Persons who make desert-land entries must acquire a clear right to the use of sufficient water to irrigate and reclaim the whole of the land entered, or as much of it as is susceptible of irrigation, and of keeping it permanently irrigated. Therefore, if a person makes an entry before he has taken steps to acquire a water right, he does so at his own risk, because, ordinarily, one entry will exhaust his right and he will not be repaid the money paid at the time of making the entry.

13. At the time of filing his application with the register and receiver the applicant should also file a map, showing the plan by which he proposes to conduct water upon the land and the manner by which he intends to irrigate the same, and at the same time he must pay the receiver the sum of 25 cents per acre for the land applied for. The receiver will issue a receipt for the money, and the register and receiver will jointly issue a certificate showing the allowance of the entry. This application will be given its proper serial number at the time it is filed, and at the end of each month an abstract of collections under these laws will be transmitted to the General Land Office.

#### ASSIGNMENTS.

14. While by the act of March 3, 1891, assignments of desert-land entries were recognized, the Land Department, largely for administrative purposes, held that a desert-land entry might be assigned as a whole, or in its entirety, but refused to recognize the assignment of only a portion of an entry. The act of March 28, 1908, however, provides for the assignment of such entries, in whole or in part; but this does not mean that less than a legal subdivision may be assigned. Therefore, no assignment, otherwise than by legal subdivisions, will be recognized.

15. The act of March 28, 1908, also provides that no person may take a desert-land entry by assignment, unless he is qualified to enter the tract so assigned to him. Therefore, if a person is not a resident citizen of the State or Territory wherein the land involved is lo-

cated, or, if he has made a desert-land entry in his own right, he can not take such an entry by assignment. The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one by assignment.

However, in view of the practice that obtained in the General Land Office prior to March 28, 1908, of recognizing the right of a person to make an entry, and also to take one or more entries by assignment, the aggregate area of the land embraced in all such entries not exceeding 320 acres, such entries and assignments so made or taken will not now be disturbed. But all assignments and entries made subsequent to the approval of the act of March 28, 1908, must be governed by the terms of that act, which is held to mean that the desert-land right is exhausted either by making an entry or by taking one by assignment. Said act provides that no assignment to, or for the benefit of, any corporation or association shall be authorized or recognized.

16. As stated above, desert-land entries may be assigned, in whole or in part, and, as evidence of the assignment, there should be transmitted to the General Land Office the original deed of assignment, or a certified copy thereof. Where the deed of assignment is recorded, a certified copy may be made by the officer who has custody of the record. Where the original deed is presented to an officer qualified to take proof in desert-land cases, a copy certified by such officer will be accepted. Attention is called to the fact that copies of deeds of assignment certified by notaries public or justices of the peace, or, indeed, any other officers than those who are qualified to take proofs and affidavits in desert-land cases, will not be accepted.

An assignee must file, with his deed of assignment, an affidavit (Form 4-274a) showing his qualifications to take the entry assigned to him. He must show what entries have been made by, or assigned to, him under the agricultural laws, and he must also show his qualifications as a citizen of the United States, that he is 21 years of age or over, and also that he is a resident citizen of the State or Territory in which the land assigned to him is situated. In short, the assignee must possess the qualifications necessary to enter the land proposed to be assigned were it subject to entry. Desert-land entries are initiated by the payment of 25 cents per acre, and no assignable right is acquired by the applicant prior to such payment. (6 L. D., 541; 33 L. D., 152.) An assignment made on the day of such payment, or soon thereafter, is treated as suggesting fraud, and such cases will be carefully scrutinized. The provision of law authorizing the assignments of desert entries, in whole or in part, furnishes no authority to a claimant under said law to make an executory contract to convey the

land after the issuance of patent, and to thereafter proceed with the submission of final proof in furtherance of such contract. The sale of the land embraced in an entry at any time before final payment is made must be regarded as an assignment of the entry, and in such cases the person buying the land must show that he possesses all the qualifications required of an assignee. (29 L. D., 453.) The assignor of a desert-land entry may execute the assignment papers wherever he may be before any officer authorized to take acknowledgments, but the assignee must execute the affidavit (Form 4-274a), and all other required oaths and affidavits, before some one of the officers specified and in the manner set out in paragraph 11 of this circular.

No assignments of desert-land entries or parts of entries are conclusive until examined in the General Land Office and found satisfactory and the assignment recognized. When recognized, however, the assignee takes the place of the assignor as effectually as though he had made the entry, and is subject to any requirement that may be made relative thereto. The assignment of a desert-land entry to one disqualified to acquire title under the desert-land law, and to whom, therefore, recognition of the assignment is refused by the General Land Office, does not of itself render the entry fraudulent, but leaves the right thereto in the assignor.

#### ANNUAL PROOF.

17. In order to test the sincerity and good faith of the claimant under the desert-land laws, and to prevent the reservation or segregation of tracts of public land in the interest of persons having no intention of reclaiming the land, but rather, by payment of the initial sum of 25 cents per acre, hoping to gain the use of the land for a number of years, Congress in the act of March 3, 1891, made the requirement that a map be filed at the initiation of the entry, showing the mode of contemplated irrigation and the proposed source of the water supply, and that there be expended yearly for three years from the date of the entry not less than \$1 for each acre of the tract entered, making a total of not less than \$3 per acre, in the necessary irrigation, reclamation, and cultivation of the land, in permanent improvements thereon, and in the purchase of water rights for the irrigation thereof, and that at the expiration of the third year a map or plan be filed showing the character and extent of the improvements placed on the claim. The said act, however, authorizes the submission of final proof at an earlier date than four years from the time the entry is made in cases wherein reclamation has been effected and expenditures of not less than \$3 per acre have been made. Proof of these expenditures must be made before some officer authorized to administer oaths in desert-land cases. (See par. 11 hereof.) This proof, which is known as yearly or annual proof,

must be made by applicant, whose affidavit must be corroborated by affidavits of two reputable witnesses, all of whom must have personal knowledge that the expenditures were made for the purpose stated in the proof.

18. Expenditures for the construction and maintenance of storage reservoirs, dams, canals, ditches, and laterals to be used by claimant for irrigating his land, for roads where they are necessary, for erecting stables, corrals, etc., for digging wells, where the water therefrom is to be used for irrigating the land, and for leveling and bordering land proposed to be irrigated will be accepted. Expenditures for fencing all or a portion of the claim may be accepted, in case it is clearly shown that the fence is necessary for the protection of a portion of the land being prepared for irrigation and cultivation or for the protection of canals, ditches, etc., thereon. Expenditures for surveying, for the purpose of ascertaining the levels for canals, ditches, etc., and for the first breaking or clearing of the soil may be accepted.

Expenditures for cultivation after the soil has been first prepared may not be accepted, because the claimant is supposed to be compensated for such work by the crops to be reaped as a result of cultivation. Expenditures for surveying the claim in order to locate the corners of same may not be accepted. The cost of tools, implements, wagons, and repairs to same, used in construction work may not be computed in the cost of construction. Expenditures for material of any kind will not be allowed unless such material has actually been installed or employed in and for the purpose for which it was purchased. For instance, if credit is asked for posts and wire for fences or for a pump or other well machinery, it must be shown that the fence has been actually constructed or the well machinery actually put in place. Annual proofs must contain itemized statements showing the manner in which expenditures were made.

No expenditure for stock or interest in an irrigating company, through which water is to be secured for irrigating the land, will be accepted as satisfactory annual expenditure until a special agent, or other authorized officer, has submitted a report as to the resources and reliability of the company, including its actual water right, and such report has been favorably acted upon by the department. The stock purchased must carry the right to water, and it must be shown that payment in cash has been made at least to the extent of the amount required in connection with the annual proof submitted, and such stock must be actually owned by the claimants at the time of the submission of final proof. A certificate of the Secretary, or other qualified officer of the company involved, must be furnished, showing the extent of actual water appropriation by the company, to what extent water had been previously disposed of, quantity of water

carried under the stock or interest purchased by the desert claimant, and a statement showing the previous ownership of the shares of stock forming the basis of proffered proof, and a description of the land in connection with which such stock has been previously issued or used. Circumstances in connection with stock which has been previously made the basis of proof or annual expenditure will be carefully scrutinized and inquired into.

Registers and receivers are instructed to carefully examine all annual proofs filed and are authorized to suspend same, with notice to claimants to cure defects within thirty days, or to reject, subject to the usual right of appeal to the Commissioner of the General Land Office. These proofs are to be forwarded with the regular monthly returns.

At the end of each year, if the required proof of actual expenditures has not been made, the register and receiver will send the entryman notice and allow him sixty days in which to submit such proof. If the proof is not furnished as required, the fact that notice was served upon the claimant should be reported to the General Land Office, with evidence of service, whereupon the entry will be canceled. Registers and receivers should keep on hand a sufficient supply of blank forms used in notifying the entrymen that annual proofs are due, and they should send such notices whenever necessary, without waiting for instructions from the General Land Office.

19. Nothing in the statutes or regulations should be construed to mean that the entryman must wait until the end of the year to submit his annual proof, because the proof may be properly submitted as soon as the expenditures have been made. Proof sufficient for the three years may be offered whenever the amount of \$3 an acre has been expended in reclaiming and improving the land, and thereafter annual proof will not be required.

#### FINAL PROOF.

20. The entryman, his assigns, or, in case of death, his heirs or devisees, are allowed four years from date of the entry within which to comply with the requirements of the law as to reclamation and cultivation of the land and to submit final proof, but final proof may be made and patent thereon issued as soon as there has been expended the sum of \$3 per acre in improving, reclaiming, and irrigating the land, and one-eighth of the entire area entered has been actually cultivated with irrigation, and when the requirements of the desert-land laws as to water rights and the construction of the necessary reservoirs, ditches, dams, etc., have been fully complied with. The cultivation and irrigation of the one-eighth of the entire area may be had in a body on one legal subdivision or may be distributed over several subdivisions. When an entryman has reclaimed the land and is

ready to make final proof, he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land and must describe the entry by giving the number thereof and the name of the entryman. If the proof is made by an assignee, his name, as well as that of the original entryman, should be stated. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in this notice, two of whom must be used in making the proof.

21. This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land (see 38 L. D., 131), and it must also be posted in a conspicuous place in the local land office for the same period of time. The date fixed for the taking of the proof must be at least thirty days after the date of first publication. Proof of publication must be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

22. At the time and place mentioned in the notice, and before the officer named therein, the claimant will appear with two of the witnesses named in the notice and make proof of the reclamation, cultivation, and improvement of the land. This proof may be taken by any one of the officers named in paragraph 11 hereof. All claimants, however, are advised that, whenever possible, they should make proof before the register or receiver, because by doing so, they may, in many instances, avoid such delay as results from the practice whereby proofs submitted before officers other than the register or receiver are frequently suspended for investigation by a special agent.

The testimony of each claimant should be taken separate and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separate and apart from and not within the hearing of either the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state, in and as a part of the final proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others. In every instance where, for any reason whatever, final proof is not submitted within the four years prescribed by law, or within the period of an extension granted for submitting such proof, an affidavit should be filed by claimant, with the proof, explaining the cause of delay.

#### IRRIGATION, CULTIVATION, AND WATER RIGHTS.

23. The final proof must show specifically the source and volume of the water supply and how it was acquired and how maintained. The number, length, and carrying capacity of all ditches to and on

each of the legal subdivisions must also be shown. The claimant and the witnesses must each state in full all that has been done in the matter of reclamation and improvement of the land, and must answer fully, of their own personal knowledge, all of the questions contained in the final-proof blanks. They must state plainly whether at any time they saw the land effectually irrigated, and the different dates on which they saw the land irrigated should be specifically stated.

24. While it is not required that all of the land shall have been actually irrigated at the time final proof is made, it is necessary that the one-eighth portion which is required to be cultivated shall also have been irrigated in a manner calculated to produce profitable results, considering the character of the land, the climate, and the kind of crops being grown. (Alonzo B. Cole, 38 L. D., 420.) Furthermore, the final proof must clearly show that all of the permanent main and lateral ditches necessary for the irrigation of all the irrigable land in the entry have been constructed so that water can be actually applied to the land as soon as it is ready for cultivation. If there are any high points or any portions of the land, which for any reason it is not practicable to irrigate, the nature, extent, and situation of such areas in each legal subdivision must be fully stated. If less than one-eighth of a smallest legal subdivision is practically susceptible of irrigation from claimant's source of water supply, such subdivision must be relinquished.

25. As a rule, actual tillage of one-eighth of the land must be shown. It is not sufficient to show only that there has been a marked increase in the growth of grass, or that grass sufficient to support stock has been produced on the land, as a result of irrigation. If, however, on account of some peculiar climatic or soil conditions, no crops except grass can be successfully produced, or if actual tillage will destroy or injure the productive quality of the soil, the actual production of a crop of hay, of merchantable value, will be accepted as sufficient compliance with the requirements as to cultivation (32 L. D., 456). In such cases, however, the facts must be stated, and the extent and value of the crop of hay must be shown, and, as before stated, that same was produced as a result of actual irrigation.

26. The final proof must also show that the claimant has made the preliminary filings and taken such other steps as are required by the laws of the State or Territory in which the land is located, for the purpose of securing a right to the use of a sufficient supply of water to irrigate successfully all of the irrigable land embraced in his entry. It is a well-settled principle of law in all of the States and Territories in which the desert-land acts are operative, that actual application to a beneficial use of water appropriated from public streams measures the extent of the right to the water, and that failure to proceed with reasonable diligence to make such application to beneficial use, within



a reasonable time, constitutes an abandonment of the right. (Wiel's Water Rights in the Western States, sec. 172.) The final proof, therefore, must show that the claimant has exercised such diligence as will, if continued, under the operation of this rule, result in his definitely securing a perfect right to the use of sufficient water for the permanent irrigation and reclamation of all of the irrigable land in his entry. To this end, the proof must at least show that water, which is being diverted from its natural course and claimed for the specific purpose of irrigating the lands embraced in claimant's entry, under a legal right acquired by virtue of his own or his grantor's compliance with the requirements of the state or territorial laws governing the appropriation by individuals of the waters of public streams or other sources of supply, as shown by the record evidence of such right which accompanies the proof, has actually been conducted through claimant's main ditches to and upon the land; that one-eighth of the land embraced in the entry has been actually irrigated and cultivated and that water has been brought to such a point on the land as to readily demonstrate that the entire irrigable area may be irrigated from the system and that he is prepared to distribute the water so claimed over all of the irrigable land in each smallest legal subdivision in quantity sufficient for practical irrigation as soon as the land shall have been cleared or otherwise prepared for cultivation. The nature of the work necessary to be performed in and for the preparation for cultivation of such part of the land as has not been irrigated should be carefully indicated, and it should be shown that the said work of preparation is being prosecuted with such diligence as will permit of beneficial application of appropriated water within a reasonable time.

27. In those States where entrymen have made applications for water rights and have been granted permits, but where no final adjudication of the water right can be secured from the state authorities, owing to delay in the adjudication of the water courses, or other delay for which the entrymen are in no way responsible, proof that the entrymen have done all that is required of them by the laws of the State, together with proof of actual irrigation of one-eighth of the land embraced in their entries, may be accepted. This modification of the rule that the claimant must furnish evidence of an absolute water right will apply only in those States where, under the local laws, it is absolutely impossible for the entryman to secure final title to his water right within the time allowed him to submit final proof on his entry, and in such cases the best evidence obtainable must be furnished.

28. Where final proof is not made within the period of four years, or within the period for which an extension of time has been granted,

the register and receiver should send the claimant a notice, addressed to him at his post-office address of record, informing him that he will be allowed ninety days in which to submit final proof. Should no action be taken within the time allowed, the register and receiver will report that fact, together with evidence of service, to the General Land Office, whereupon the entry will be canceled.

EXTENSION OF TIME IN SUBMITTING PROOF UNDER CERTAIN CONDITIONS.

29. Under the provisions of the act of March 28, 1908, the period of four years may be extended, in the discretion of the Commissioner of the General Land Office, for an additional period not exceeding three years, if, by reason of some unavoidable delay in the construction of the irrigating works intended to convey water to the land, the entryman is unable to make proof of reclamation and cultivation required within the four years. This does not mean that the period within which proof may be made will be extended as a matter of course for three years. The statute authorizes the Commissioner of the General Land Office to grant the extension, in his discretion, for such a period as he may deem necessary for the completion of the reclamation, not exceeding three years, but such applications for extension will not be granted unless it be clearly shown that the failure to reclaim and cultivate the land within the regular period of four years was due to no fault on the part of the entryman, but to some unavoidable delay in the construction of the irrigation works, for which he was not responsible and could not have readily foreseen. Under no other condition is an extension of time to make final proof authorized, except in cases falling under section 5 of the act of June 27, 1906, pertaining to the entry of land within the limits of reclamation projects.

An entryman who desires to make application for extension of time under the provisions of the act of March 28, 1908, should file with the register and receiver an affidavit setting forth fully the facts, showing how and why he has been prevented from making final proof of reclamation and cultivation within the regular period. This affidavit should be executed before one of the officers named in paragraph 11 of this circular and must be corroborated by two witnesses who have personal knowledge of the facts, and the register and receiver, after carefully considering all of the facts, will forward the application to the General Land Office, with appropriate recommendation thereon. Inasmuch as registers and receivers reside in their respective districts, they are presumed to have more or less personal knowledge of the conditions existing therein, and for that reason much weight will be given their recommendations.

## PAYMENTS—FEES.

30. At the time of making final proof the claimant must pay to the receiver the sum of \$1 per acre for each acre of land upon which proof is made. This, together with the 25 cents per acre paid at the time of making the original entry, will amount to \$1.25 per acre, which is the price to be paid for all lands entered under the desert-land law, regardless of their location. The receiver will issue a receipt for the money paid, and, if the proof is satisfactory, the register will issue a certificate in duplicate and deliver one copy to the entryman and forward the other copy to the General Land Office at the end of the month during which the certificate was issued.

If the entryman is dead and proof is made by anyone for the heirs, no will being suggested in the record, the final certificate should issue to the heirs generally, without naming them; if by anyone for the heirs or devisees, final certificate should issue, in like manner, to the heirs or devisees.

When final proof is made on an entry made prior to the act of March 28, 1908, for unsurveyed land, if such proof is satisfactory, the register and receiver will approve the same and forward it to the General Land Office without collecting the final payment of \$1 an acre and without issuing final certificate. Fees for reducing the final-proof testimony to writing should be collected and receipt issued therefor, if the proof is taken before the register and receiver. As soon as the land is surveyed they will call upon the entryman to make proof, in the form of an affidavit, duly corroborated, showing the legal subdivisions covered by his entry. When this has been done the register and receiver will, in the absence of conflict or other objection, correct their records so as to make them describe the land by legal subdivisions, and, if final proof has been made and found satisfactory and no other objections exist, final papers should be issued upon payment of the proper amount.

31. No fees or commissions are required of persons making entry under the desert-land laws, except such fees as are paid to the officers for taking the affidavits and proofs. The only payments made to the Government are the original payment of 25 cents an acre at the time of making the application and the final payment of \$1 an acre, to be paid at the time of making final proof. Where final proofs are made before the register or receiver in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana they will be entitled to receive, jointly, 22½ cents for each 100 words of testimony reduced to writing; in all other States they will be allowed 15 cents per 100 words for such service. The United States commissioners; United States court commissioners, judges, and clerks are not entitled to receive a greater sum than 25

cents for each oath administered by them, except that they are entitled to receive \$1 for administering the oath to each entryman and each final-proof witness where final-proof testimony has been reduced to writing by them.

#### CONTESTS AND RELINQUISHMENTS.

32. Contests may be initiated against a desert-land entry for illegal inception, abandonment, or failure to comply with the law after entry. Successful contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry, in the same manner as in homestead cases, and the register will give the same notice and is entitled to the same fee for notice as in other cases. However, see, in this connection, the act of June 25, 1910 (36 Stat., 867).

33. A desert-land entry may be relinquished at any time by the party owning the same, and when relinquishments are filed in the local land office the entries will be canceled by the register and receiver in the same manner as in homestead, preemption, and other cases, under the first section of the act of May 14, 1880 (21 Stat., 140).

#### DESERT-LAND ENTRIES WITHIN A RECLAMATION PROJECT.

34. By section 5 of the act of June 27, 1906 (34 Stat., 519), it is provided that any desert-land entryman who has been or may be directly or indirectly hindered or prevented from making improvements on or from reclaiming the lands embraced in his entry, by reason of the fact that such lands have been embraced within the exterior limits of any withdrawal under the reclamation act of June 17, 1902, will be excused during the continuance of such hindrance from complying with the provisions of the desert-land laws.

35. This act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project or by any withdrawal of public lands under the reclamation act, from improving or reclaiming the lands covered by their entries.

36. No entryman will be excused under this act from a compliance with all of the requirements of the desert-land law until he has filed in the local land office for the district in which his lands are situated an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and extent of the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge.

37. The register and receiver will at once forward the application to the engineer in charge of the reclamation project under which the lands involved are located and request a report and recommendation

thereon. Upon the receipt of this report the register and receiver will forward it, together with the applicant's affidavit and their recommendation, to the General Land Office, where it will receive appropriate consideration and be allowed or denied, as the circumstances may justify.

38. Inasmuch as entrymen are allowed one year after entry in which to submit the first annual proof of expenditures for the purpose of improving and reclaiming the land entered by them, the privileges of this act are not necessary in connection with annual proofs until the expiration of the years in which such proofs are due. Therefore, if at the time that annual proof is due it can not be made, on account of hindrance or delay occasioned by a withdrawal of the land for the purpose indicated in the act, the applicant will file his affidavit explaining the delay. As a rule, however, annual proofs may be made, notwithstanding the withdrawal of the land, because expenditures for various kinds of improvements are allowed as satisfactory annual proofs. Therefore an extension of time for making annual proof will not be granted unless it is made clearly to appear that the entryman has been delayed or prevented by the withdrawal from making the required improvements; and, unless he has been so hindered or prevented from making the required improvements, no application for extension of time for making final proof will be granted until after all the yearly proofs have been made.

39. An entryman will not need to invoke the privileges of this act in connection with final proof until such final proof is due, and if at that time he is unable to make the final proof of reclamation and cultivation as required by law, and such inability is due, directly or indirectly, to the withdrawal of the land on account of a reclamation project, the affidavit explaining the hindrance and delay should be filed in order that the entryman may be excused for such failure.

40. When the time for submitting final proof has arrived and the entryman is unable, by reason of the withdrawal of the land, to make such proof, upon proper showing, as indicated herein, he will be excused, and the time during which it is shown that he has been hindered or delayed on account of the withdrawal of the land will not be computed in determining the time within which final proof must be made.

41. If after investigation the irrigation project has been or may be abandoned by the Government, the time for compliance with the law by the entryman will begin to run from the date of notice of such abandonment of the project and of the restoration to the public domain of the lands which had been withdrawn in connection with the project. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entryman

must comply with all the provisions of the act of June 17, 1902, and must relinquish all the land embraced in his entry in excess of 160 acres, and upon making final proof and complying with the terms of payment prescribed in said act of June 17, 1902, he shall be entitled to patent.

42. Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the reclamation act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation.

43. Desert-land entrymen within exterior boundaries of a reclamation project who expect to secure water from the Government must relinquish all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office and must reclaim one-half of the irrigable area covered by their water right in the same manner as private owners of land irrigated under a reclamation project.

44. All previous rulings and instructions not in harmony herewith are hereby vacated.

FRED DENNETT, *Commissioner.*

Approved.

FRANK PIERCE,

*Acting Secretary.*

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#### STATUTES.

An Act to Provide for the Sale of Desert Lands in Certain States and Territories.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section,<sup>a</sup> by conducting water upon the same, within the period of three years<sup>b</sup> thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable,

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<sup>a</sup> Limited to 320 acres by act of March 3, 1891 (26 Stat., 1095).

<sup>b</sup> Time extended to four years by act of March 3, 1891, *supra*.

shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years<sup>b</sup> after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: *Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres, which shall be in compact form.

SEC. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

SEC. 3. That this act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Approved, March 3, 1877 (19 Stat., 377).

#### Three Hundred and Twenty Acre Limitation.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

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No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

Approved, August 30, 1890 (26 Stat., 391).

#### An Act to Repeal Timber-Culture Laws, and for Other Purposes.

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SEC. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred and seventy-seven, is hereby amended by adding thereto the following sections:

SEC. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land which shall exhibit a plan showing the

mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections or fractional parts of sections of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act: *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the



claims or entries made under this or any preceding act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States.

SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

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Approved, March 3, 1891 (26 Stat., 1095).

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Section 2294, United States Revised Statutes, as Amended by Act of March 4, 1904 (33 Stat., 59).

SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

“For each affidavit, twenty-five cents.

“For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

“For each deposition of claimant or witness, prepared by the officer, one dollar.

“Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars.”

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**An Act Providing for the Subdivision of Lands Entered Under the Reclamation Act, and for Other Purposes.**

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SEC. 5. That where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Approved, June 27, 1906 (34 Stat., 520).

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**An Act Providing for Second Desert-Land Entries.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who prior to the passage of this act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert-land entry under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration

Approved, March 26, 1908 (35 Stat., 48).

An Act Limiting and Restricting the Right of Entry and Assignment Under the Desert-Land Law and Authorizing an Extension of Time within which to Make Final Proof.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act the right to make entry of desert lands under the provisions of the act approved March third, eighteen hundred and seventy-seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," as amended by the act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," shall be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however*, That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

SEC. 2. That from and after the date of the passage of this act no assignment of an entry made under said acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

SEC. 3. That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof, as required by said acts, of the completion of said work.

Approved, March 28, 1908 (35 Stat., 52).

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An Act for the Protection of the Surface Rights of Entrymen.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent,

except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction; *Provided*, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved, March 3, 1909 (35 Stat., 844).

An Act to Provide for Agricultural Entries on Coal Lands.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An act to provide for an enlarged homestead:" *Provided*, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

SEC. 2. That any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the reclamation act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this act.

SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in

such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Approved, June 22, 1910 (Sess. Laws, 2d sess., 61st Cong., 583).

An Act for the Relief of Assignees in Good Faith of Entries of Desert Lands in Imperial County, California.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person, other than a corporation, who has in good faith heretofore acquired by assignment a desert-land entry, which entry is regular upon its face, in the belief that he was obtaining a valid title thereto, which assignment was accepted when filed at the local land office of the United States and recognized at the General Land Office as a proper transfer of such entry, shall be entitled to complete the entry so acquired, notwithstanding any contest that has been or may be filed against such entry, based upon a charge of fraud of which the assignee had no knowledge: *Provided, however*, That this act shall only apply to any person who at the time of receiving such assignment was without notice of any fraud in the entry assigned or in any annual proof made concerning the same: *Provided further*, That patent shall not issue to any such assignee unless he shall affirmatively establish, by his evidence, under oath, good faith and lack of notice of fraud, and by the testimony, under oath, of himself and at least two witnesses that expenditure in the total amount and cultivation and reclamation to the full extent required by law have been actually made and accomplished: *And provided further*, That nothing herein contained shall be construed to waive or avoid liability for any fraud or violation of the law on the part of the person committing the same.

SEC. 2. That where a person having made entry under the desert-land law was thereafter permitted by the Land Department to hold another entry or entries by assignment, or where a person having previously perfected title under assignment of a desert-land entry, or having held land under assignment to the amount of three hundred and twenty acres or more at different times, was

thereafter permitted by the Land Department to make an entry in his own right, or to hold other lands under assignment, such persons, or their lawful assignees, shall be, upon showing full compliance with all requirements of existing law as to expenditure, reclamation, and cultivation, permitted to complete title to the land now held by them, notwithstanding any contest that may have been or may hereafter be filed against the entry based upon the charge that the present claimant has exhausted his right under the desert-land law by reason of having previously made an entry or held land under an assignment as above detailed; *Provided, however*, That this section shall not be applicable to entries made or taken by assignment subsequently to November thirtieth, nineteen hundred and eight: *Provided, further*, That no person shall be entitled to the benefits of either the first or second section of this act who has heretofore acquired title to three hundred and twenty acres of land under the desert-land laws; nor shall this act be construed to modify in any manner the provisions of the act of August thirtieth, eighteen hundred and ninety (Twenty-sixth Statutes, three hundred and ninety-one), and the seventeenth section of the act of March third, eighteen hundred and ninety-one (Twenty-sixth Statutes, ten hundred and ninety-five), restricting the quantity of lands that may be acquired under the agricultural-land laws.

Sec. 3. The provisions of this act shall apply to Imperial County, California, only.

Approved June 25, 1910 (Sess. Law, 2d sess., 61st Cong., 867).

**APPLICATIONS FOR LEAVES OF ABSENCE—RECLAMATION HOMESTEADS—ACT OF JUNE 25, 1910.**

**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., October 3, 1910.*

THE HONORABLE THE SECRETARY OF THE INTERIOR.

SIR: The circular of this office approved by the Acting Secretary of the Interior September 13, 1910 (39 L. D., 202), containing recent acts and regulations in regard to reclamation lands, provides that an application for leave of absence, under the act of June 25, 1910 (36 Stat., 864), shall be received and noted by the local officers where presented and transmitted, with recommendation, to the General Land Office for action.

On page 2, in the second paragraph from the bottom, in line 4 of said paragraph, after the word "and," should be inserted the following words: "at once, by special letter;" so that the said paragraph should read as follows:

When homestead entrymen within irrigation projects file in your office applications for leave of absence under the provisions of this act, you will make proper notations of the same on your records, and at once, by special letter, forward the application, together with your recommendation thereon, to the General Land Office for action.

It is proposed by this office to take immediate action on such applications for leave of absence in order to prevent unnecessary delay and hardship to entrymen.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved, October 3, 1910:

R. A. BALLINGER, *Secretary.*

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**HOMESTEAD IN NATIONAL FOREST—ENTRY SUBSEQUENT TO TEMPORARY WITHDRAWAL—SETTLEMENT PRIOR TO SURVEY.**

LIZZIE TRASK.

*Decided October 4, 1910.*

A homestead entry allowed subsequent to temporary withdrawal of the land with a view to possible inclusion in a national forest, based upon a valid settlement right initiated prior to survey and subsisting at the date of such withdrawal, excepts the land from a later proclamation including the land within a national forest, notwithstanding more than three months from the filing of the township plat had elapsed at the time the entry was made.

Where a settler upon unsurveyed land dies prior to survey, after having resided upon and cultivated the land for five years and therefore become entitled, upon making entry and final proof, to a patent, and his widow, after his death, continues to assert the right, she is entitled, upon filing of the plat of survey, to make entry and proof and complete title to the land.

PIERCE, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office of May 5, 1910, holding for cancellation homestead entry No. 573, made by Lizzie Trask as the widow of J. J. Trask, deceased, January 12, 1907, at Phoenix, Arizona, for the NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. 9, T. 18 S., R. 19 E., G. and S. R. M. Amendment of the entry to include the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 10, same township and range, was permitted February 4, 1908. The land, which was unsurveyed until 1905, the township plat being filed in the local land office October 16, 1905, was temporarily withdrawn October 2, 1905, and included within the Santa Rita National Forest, by proclamation of May 27, 1907 (35 Stat., 2139). The Commissioner's action was upon the ground that the above withdrawal of October 2, 1905, attached as an adverse claim because of the entrywoman's failure to make entry within three months of the filing of the township plat.

At the time of making her entry the widow filed an affidavit which stated that her deceased husband made settlement upon the land July 1, 1883, and maintained a continuous residence thereon until

his death, January 13, 1898; that he made improvements, consisting of fencing, corrals and a house, the land being used for grazing purposes only; that she had resided on the land with her husband until his death; and that the reason why she did not make entry sooner was because she had been informed that it was not legal for her to do so, and because of ill health which prevented her remaining in Arizona. The final proof, made January 8, 1909, further stated that all the land was under fence, and that the widow had grazed it continuously since her husband's death. Action thereon was deferred, pending a protest by the Forest Service.

The proclamation of May 27, 1907, *supra*, excepted from the force and effect thereof—

all lands which are at this date embraced in any *legal entry* or covered by any lawful filing or selection duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, if the statutory period within which to make entry or filing of record has not expired; . . . . *Provided*, That these exceptions shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made . . . . ; and provided that these exceptions shall not apply to any land embraced in any selection, entry, or filing, which may have been permitted to remain of record subject to the creation of a permanent reservation.

Under similar proclamations the Department has held that the claim of a settler upon unsurveyed land who fails to place the same of record within three months of the filing of the township plat, lapses (Arnold Wink, 31 L. D., 47; Joshua L. Smith, 31 L. D., 57; William Breeding, 31 L. D., 80). In the present case, however, the entry was made prior to the proclamation, and if it was a "legal entry" was excepted therefrom. (E. S. Gosney, 30 L. D., 44.) The question therefore arises whether this homestead entry was properly or improperly allowed, in view of the temporary withdrawal order of October 2, 1905, and of claimant's failure to make entry within three months of the filing of the township plat.

That order temporarily withdrew from "settlement, entry, sale, or other disposal, except under the mineral laws, all the vacant unappropriated public lands in the following described areas, pending the determination as to the advisability of including said lands in forest reserves." It must be conceded that if Mrs. Trask, at the time of this order, had a valid settlement claim as the widow of her deceased husband, the land was not vacant, unappropriated land, and was excepted therefrom.

The first recognition of the right of homestead settlers on unsurveyed land was contained in section 3 of the act of May 14, 1880 (21 Stat., 140), as follows:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the



same time to file his homestead application and perfect his original entry in the United States land-office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

Under this act the Department held, in the case of Tobias Beckner (6 L. D., 134), that where a homestead settler died prior to survey the right of entry inured to his devisee. In that of Bryant *v.* Begley (23 L. D., 188) it was held that under this act the right of a homestead settler relates back to the date of his settlement, and if at the date of his application to enter he has prior thereto lived on the land and complied with the law for the statutory period, his interest therein, in the absence of any intervening adverse claim, becomes at once a vested and devisable right. (See, also, James McCourt, 33 L. D., 386.) The Department, in Bellamy *v.* Cox (24 L. D., 181, at 182), said:

In the case of Prestina B. Howard, 8 L. D., 286, it was held that since the passage of the act of May 14, 1880, the right given the widow, heirs, or devisee of a deceased homesteader by section 2291 of the Revised Statutes to fulfill the law, make proof, and receive patent, inures to them as well when the homestead right rests on settlement under said act as when founded on formal application to enter.

The above decisions are carried into effect in paragraph 21, circular of April 10, 1909 (37 L. D., 638).

In the case of the Heirs of Irwin *v.* State of Idaho *et al.* (38 L. D., 219) it was held that where a homestead right was initiated by settlement upon unsurveyed land and the homesteader dies prior to survey, having complied with the law to the date of his death, his heirs are entitled to complete the claim, if promptly asserted, and acquire title, even though the land had been included, by Executive proclamation, within a permanent forest reserve.

The above views are also in harmony with the holdings of the Supreme Court. Sturr *v.* Beck (133 U. S., 541, 547) cites, with approval, the ruling of the land department, that if the settler shall fully comply with the law as to continuous residence and cultivation the settlement defeats claims intervening between its date and the date of filing homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement. Justice White, in St. Paul, Minneapolis & Manitoba Railway Company *v.* Donohue (210 U. S., 21, 30), succinctly states the law as follows:

It was not until May 14, 1880 (c. 89, 21 Stat., 141), that a homestead entry was permitted to be made upon unsurveyed public land. The statute which operated this important change moreover modified the homestead law in an important particular. Thus, for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the Land Office.

The widow of a deceased homestead settler is not required to live on the land, but may, by continued cultivation for the required period, complete the claim and receive patent. (*Tauer v. The Heirs of Walter A. Mann*, 4 L. D., 433; *Heirs of Stevenson v. Cunningham*, 32 L. D., 650.)

From the above it is plain that at the time of the temporary withdrawal, October 2, 1905, the entrywoman had a valid settlement claim as the widow of her deceased husband, and that her entry was properly allowed, unless forfeited by her failure to place it of record within three months of the filing of the township plat.

Section 3 of the act of May 14, 1880, permits a settler on unsurveyed land the same time to file his homestead application and perfect his entry "as is now allowed to settlers under the preemption laws to put their claims on record." This refers to section 5 of the act of March 3, 1843 (5 Stat., 620), which provides:

*And be it further enacted*, That claimants under the late pre-emption law, for land not yet proclaimed for sale, are required to make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has been already made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract, and the time of settlement; otherwise his claim to be forfeited, and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law.

The Supreme Court, in *Johnson v. Towsley* (13 Wall., 72), construed this provision of the preemption acts, saying, at page 90:

It declares that where the party fails to make the declaration within the three months his claim is to be forfeited and the tract awarded to the next settler in order of time on the same tract, who shall have given such notice and otherwise complied with the conditions of the law. The words "shall have given such notice," presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right.

In harmony with this construction, the Department, in *State of South Dakota v. Thomas* (35 L. D., 171), held that a settler upon unsurveyed land who failed to assert his claim within three months did not forfeit his settlement right in favor of the State's claim under its school land grant, saying, at page 173:

For the protection of other settlers under the public land laws, it is provided that those settling upon the public lands must make assertion of their claims within a given time or forfeit the same to the next settler in order of time who shall comply with all the provisions of the law, but this forfeiting provision in favor of the next settler in order of time has never been applied by this Department in favor of a grantee claimant.

So in Winfred S. Schmitz (38 L. D., 587), where lands had been included within a national forest by Executive proclamation which excepted therefrom any tract covered by any prior claim so long as such claim should exist, the Department held that settlement excepted the land claimed although the settler failed to make entry within the stated three months. The cases of Arnold Wink, Joshua L. Smith, and William Breeding, cited above, are based upon the language of the proclamation excepting all lands "upon which any valid settlement has been made, pursuant to law, and the *statutory period within which to make entry or filing of record has not expired.*"

It follows, therefore, that upon the record as presented by the claimant in her application to make entry and in her final proof, the action below was erroneous.

The reports of the Chief of Field Division and forest officers who have investigated this matter disclose a somewhat different state of facts. The entryman erected a house in 1883, and lived upon the land until 1889, when the house was removed to the adjoining land of his son, where he lived until his death, in 1898. The land was continuously grazed by him and his widow from 1883 to 1908. The wife never lived upon the homestead, but resided in the town of Benson, Arizona, where she conducted a lodging house. The settler's rights, however, were initiated by his settlement and relate back to its date. At the time of his death, therefore, a right to a patent had vested in him, upon making entry and final proof, which right was continuously asserted by his widow.

The decision of the Commissioner is accordingly reversed, and the entry will, if no other objection appear, be passed to patent.

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**DESERT LAND ENTRY—CULTIVATION OF LESS THAN ONE EIGHTH OF THE AREA.**

HENRY WELZE.

*Decided October 5, 1910.*

Where cultivation of one eighth of the area of a desert land entry covering a smallest legal subdivision is rendered impossible by reason of physical conditions on the ground, proof showing that the entryman has cultivated all the area susceptible of cultivation may be accepted and the entry submitted to the board of equitable adjudication.

PIERCE, *First Assistant Secretary*:

May 16, 1908, Henry Welze, of Trinidad, Washington, made desert-land entry number 305 (Serial 05603) for the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 30, T. 20 N., R. 23 E., W. M., 40 acres, Waterville, Washington, land district. Final proof was submitted June 22, 1909, and because of protest against the validity of the entry, filed in the office of the chief of field division, was suspended by the register.

July 6, 1909, a special agent, through the chief of field division, made report as follows:

May 16, 1908, Henry Welze made desert land entry No. 05603, Waterville series, for the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 30, T. 20 N., R. 23 E., and on June 22, 1909, submitted final proof thereon, action being deferred by the register and receiver pending field investigation and report by a special agent, at the request of the chief of field division.

By direction of the chief of field division I made personal examination herein June 16, 1909. Such portion of the land as is susceptible of cultivation is arid and properly subject to entry under the desert land act.

The improvements thereon consist of  $3\frac{1}{2}$  acres fenced and under cultivation; 130 feet main ditch; 1300 feet of laterals; 460 feet 8-inch flume; good barn  $16 \times 16$ . Value of improvements \$250.

The source of the water supply is the Columbia River, from which water is pumped by means of a gasoline engine owned by A. M. Brown and carried to the land by means of a small ditch and the flume above mentioned, a distance of  $\frac{1}{2}$  mile over land owned by Brown and over which entryman has a deeded right of way. Brown's water right I understand, is based upon riparian rights, and he has deeded to entryman a supply of water sufficient to irrigate the land in question.

The land is located about  $\frac{1}{2}$  mile back from the Columbia River and there is only  $3\frac{1}{2}$  acres on the entire tract which can be farmed or in any manner cultivated. This tract lies in the coulee, and a wall of solid rock rises to a height of 800 feet. The balance of the land,  $36\frac{1}{2}$  acres, is situated on the bench, is steep, very broken and covered with broken basalt rock, and no portion of this land could be cultivated.

The entryman has constructed a good house (which has not been taken into consideration in the estimate of the value of his improvements) on the irrigated portion, in which he and his wife reside. The entryman is an invalid, having been overcome by the heat while serving in the United States army during an Indian campaign. The  $3\frac{1}{2}$  acres which has been reclaimed is amply sufficient to produce a living and is worth, in its present state, \$150 per acre.

While the desert land act requires that  $\frac{1}{2}$  of the land be under cultivation and water conducted upon the entire tract, it would not appear that impossibilities should be exacted, and in view of the fact that the entryman has reclaimed all of the land susceptible of reclamation, it is respectfully recommended that, the proof being otherwise regular, final certificate issue and the entry pass to patent.

Upon examination of the record the Department finds the statements made in said report correct and adopts them as findings of fact in this case.

By the decision of the Commissioner of the General Land Office, of date January 20, 1910, after a statement of facts not differing

materially from the above-quoted report of the special agent, it is held:

Record evidence of Brown's right to convey said water from the Columbia River to the claimant should have been furnished, and from all of the facts stated it is very evident that the law cannot be complied with as to the cultivation of one-eighth of the land. The entry is therefore hereby held for cancellation, subject to the claimant's right of appeal herefrom within sixty days from service of notice, and unless such action is taken within this time the entry will be canceled without further notice.

Welze has appealed to the Department.

After careful consideration of the entire premises it is held that claimant's evidence as to water-supply is sufficient.

The entry covers the smallest legal subdivision under the public land system of surveys, rendering it impossible to make further division.

The requirement "that proof be further required of the cultivation of one-eighth of the land" is without doubt intended to compel the entryman to make such cultivation of the tract as will show his good faith in the actual use of the land.

The evidence of good faith is amply shown by the cultivation and improvements made by the entryman. His inability to cultivate one-eighth of the land makes it necessary to submit the entry for confirmation by the board of equitable adjudication, which is rendered possible because of the fact that, the circumstances considered, there has been a substantial compliance with the requirements of the desert land law. To that end you will permit final entry, if no other objection appears, and thereafter proceed as herein indicated.

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**DESERT LAND ENTRY—WATER RIGHT—CERTIFICATE OF STOCK  
LIMITED TO A DESIGNATED TRACT.**

THEODORE A. IASIGI.

*Decided October 5, 1910.*

A certificate of stock in a water company which under the by-laws of the company is limited, under penalty, to location and use upon a certain designated twenty-acre tract, can not be accepted toward meeting the requirements of the desert-land act with respect to water rights as to another and different twenty-acre tract embraced in the same entry, notwithstanding the amount of water to which the entryman is entitled under the stock may be more than sufficient to irrigate the twenty acres to which it is appurtenant.

PIERCE, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office of May 12, 1910, holding for rejection the final proof of Theodore A. Iasigi, made February 1, 1909, upon desert land

entry No. 2800, for the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 35, T. 15 S., R. 14 E., S. B. M., now described as Tract 42, Los Angeles, California, land district.

The sole question involved is as to the sufficiency of appellant's water rights, which consisted of two certificates of stock issued by the Imperial Water Company No. 1 to "T. A. Iasigi," one, No. 3324, dated October 27, 1908, for forty shares, and attached to the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and the other, No. 3298, issued October 13, 1908, for twenty shares, attached to the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ .

The discrepancy in names has been satisfactorily explained, and the final proof may be accepted as to the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , if no other objection appear.

As to the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , the Commissioner stated:

This showing leaves 20 acres of the land of the entry unprovided with water stock, since, so far as it has been shown to this office, one share of the capital stock of the Imperial Water Company No. 1 entitles the owner thereof to an amount of water not exceeding four acre-feet per annum, which, it has been shown, is sufficient supply for one acre of land.

It will, accordingly, be necessary for the claimant to show that he has title to a sufficient water right for all of the land of the entry, or for 20 acres more than the water right shown.

Appellant contends that 2 $\frac{1}{4}$  acre-feet per annum is amply sufficient, and that therefore his water rights of sixty shares, or 240 acre-feet, meet all requirements for the 80 acres, citing the case of Alonzo B. Cole (38 L. D., 420), and paragraph 12 of the instructions of November 30, 1908 (37 L. D., 312).

It is therefore necessary to consider the nature of a water right evidenced by a certificate of shares in the Imperial Water Company No. 1, as shown by a copy of its by-laws and its contracts with the California Development Company and La Sociedad de Yrriagacion y Terrenos de la Baja California, a Mexican corporation, on file in the Department. These were also considered to some extent in the opinion of the Assistant Attorney General of February 6, 1905, in California Development Company (33 L. D., 391).

April 6, 1900, the Water Company entered into a contract with the Mexican corporation, under which the Mexican company agreed, upon demand, to furnish the Water Company annually 4 acre-feet of water for each share of the Water Company's stock, and the Water Company agreed that it would order and receive each year at least 1 acre-foot for each share. Under a contract of December 28, 1900, the California Development Company assumed the above obligation of the Mexican corporation, and these agreements were ratified by a joint contract entered into by the three companies on July 24, 1901. The Imperial Water Company No. 1, therefore, could demand a maximum of 4 acre-feet and a minimum of 1 acre-foot annually for each share of its stock. It was no doubt thought that the necessary

supply of water for each year's irrigation would be between those limits.

The by-laws of the Imperial Water Company No. 1 provided, Article XIX:

1. Shares of stock issued by this corporation will be located upon lands at the rate of one share per acre for each acre of land owned by the stockholder, where the lands can be served by the ditches of the company.

2. Water shall be delivered at the highest corner of each subdivision of 160 acres to holders of such shares so particularly located in blocks of not less than 40 shares, for use upon the lands, and only upon the lands upon which said shares of stock are located, and in the event any stockholder shall divert any part of the waters so delivered to the said land, or shall attempt to irrigate more acres of land in a tract upon which he has said stock located than he has shares of stock located thereon, then and in that event the said stockholder or his successor in interest in said stock or land shall not receive in the future any water upon said stock or for use upon the lands upon which the said stock is located, until he shall have paid to the company not only the regular price of the water ordered by him for that particular run, but also in addition a sum three times that amount; and provided, also, that the *zanjero* or superintendent or any one authorized by them, or either or them, shall at all times, when any person is so misapplying such water, have the right to shut off the same, and the said stockholder shall forfeit his right to the balance of that particular run, and shall be liable for the payment of the whole of said run, and neither he nor his successors in interest in the said stock or said land shall receive any water upon the said stock for the use upon the said land until he shall have paid to the company, in addition to the regular price of the water ordered for that particular run, a sum three times that amount; provided, that this by-law shall not interfere with any contract heretofore entered into.

From the above it is the apparent intention to limit one share of stock to one acre of land, and the stockholder is prohibited, under penalties, from irrigating "more acres of land in a tract upon which he has said stock located than he has shares of stock located thereon." Iasigi, therefore, under his certificate No. 3298, is prohibited from irrigating more than twenty acres of the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ . Can such a certificate be accepted as a sufficient evidence of water right in making final proof for the entire forty acres?

The original desert land act of March 3, 1877 (19 Stat., 377), provides:

that the right to the use of water by the person so conducting the same, on or to any tract of desert land . . . shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation.

Section 5 of the amendatory act of March 3, 1891 (26 Stat., 1095), requires the purchase of water rights for the irrigation of the land. The Department's instructions of February 17, 1904 (32 L. D., 456), require that the entryman, at the time of final proof, have an absolute right to sufficient water to successfully irrigate the land. The

instructions of November 30, 1908 (37 L. D., 312, par. 12, p. 315), provided:

Persons who make desert-land entries must acquire a clear right to the use of sufficient water to irrigate and reclaim the whole of the land entered, or as much of it as is susceptible of irrigation, and of keeping it permanently irrigated.

The final proof in the present case shows that the entire area is susceptible of irrigation. The entryman is prohibited, under penalties, from irrigating more than twenty acres of the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and although his right may call for more water than is necessary for that twenty acres, he has no right at all for the remaining twenty acres. This can not be held to be compliance with the statutes, and the instructions of the Department thereunder.

The case of Alonzo B. Cole, *supra*, cited by the appellant, is not applicable. It did not involve the question of the sufficiency of the entryman's water right, which was conceded, but held that where the final proof showed that the entryman had cultivated and irrigated at least one-eighth of the land, had constructed ditches, owned a sufficient water right, had brought water to the land, and was prepared to turn water upon the entire tract when cleared and prepared for cultivation, he was not required to show that water had been actually distributed over all the irrigable land in the entry.

The decision of the Commissioner as to the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  is therefore affirmed.

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**RAILROAD GRANT—MINERAL LAND—EFFECT OF READJUDICATION OF CHARACTER OF LANDS.**

**CENTRAL PACIFIC R. R. Co. v. DE REGO.**

*Decided October 7, 1910.*

An adjudication by the land department, in a proceeding in which that question is in issue, that lands within the primary limits of a railroad grant were at the date of the grant mineral in character, so long as it stands unimpeached, excepts them from the operation of the grant; and no rights attach thereto under the grant upon a subsequent adjudication by that department, in another proceeding, that the lands in question are at that time nonmineral.

PIERCE, *First Assistant Secretary.*

This case is before the Department on the appeal of the Central Pacific Railroad Company from the decision of the Commissioner, of date April 12, 1910, dismissing its protest against the homestead entry of Antonio Jose de Rego, made January 7, 1907, for the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 29, T. 21 N., R. 4 E., Sacramento land district, California, and denying



the company's application for the reinstatement of its previously rejected listing of said tracts.

It appears that the said section 29, including the tracts embraced in de Rego's entry, is within the primary limits of the grant made by the act of July 25, 1866 (14 Stat., 239), for the benefit of the California and Oregon Railroad Company, as fixed by the filing of the map of the constructed road opposite thereto on September 22, 1871; that the N.  $\frac{1}{2}$  and the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of said section were listed by the Central Pacific Railroad Company, successors in interest to the California and Oregon Railroad Company, November 21, 1879. These tracts, however, having been previously withdrawn as mineral, a hearing was had, on the company's application, April 28, 1879, to determine the character thereof. From the testimony adduced at that hearing, at which the company appeared, the local officers found the land to be mineral in character. No appeal was taken by the company from that finding, but, upon consideration of the record, the Commissioner, by decision of October 19, 1880, affirmed the finding. No appeal from that decision having been taken by the company, it was, by the Commissioner's letter of January 7, 1881, declared final, and the case was accordingly closed. That action constituted, in effect, a rejection of the company's listing as to the lands so in question. No further steps appear to have been taken by the company since that time to establish the nonmineral character of said tracts, or any portion thereof, at the date of the grant.

On March 4, 1907, however, Antone S. Azevedo filed a protest against the homestead of the said de Rego, which embraces a portion of the land last above described, charging, among other things, that the land covered by the entry is mineral in character. As result of the hearing had May 13, 1907, on that charge, the Department, by decision of April 26, 1909, adhered to August 26, 1909, on motion for review; found and held that the evidence thereat adduced showed, by a preponderance thereof, that the particular area is nonmineral in character, thus affirming the Commissioner's decision of March 3, 1908. Thereupon the company, on June 7 and June 21, 1909, filed the protest and application now under consideration, claiming that this land, having been now adjudicated to be nonmineral in character, must be held to have inured to the company under its grant, and hence was not subject to the entry of de Rego.

In the appeal it is likewise urged by the company that in view of the present nonmineral character of the land, as recently found by the Department, the company is entitled to a patent thereto, unless, at the date of the filing of the official plat of survey, the land had been "granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of." It is asserted, however, that none of these conditions then existed with respect to this land, and it is

accordingly again asked that the entry be canceled, and that the listing be reinstated, with a view to the patenting of the land to the company.

The grant to the company, as provided in section 2 of the act of July 25, 1866, *supra*, was of—

every alternate section of public lands not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies, in lieu thereof, under the direction of the Secretary of the Interior, etc.

And by section 10 of the act it is provided that—

All mineral lands shall be excepted from the operation of this act, . . . *Provided*, That the term "mineral lands" shall not include lands containing coal and iron.

Mineral lands, as therein defined, were, therefore, not only not granted by that act, but were expressly excepted from the operation thereof. It is settled law that the discovery of the mineral character of lands within the limits of such a grant at any time prior to the issuance of patent therefor to a railroad company operates to except the same from the operation of the grant (*Barden v. Northern Pacific Railroad Company*, 154 U. S., 288); and it is equally well established that such a grant, being one *in presenti*, takes effect, if at all, as to a particular tract, at its inception, and if the tract is then of the class or character of those specifically excepted, it remains forever excepted, whatever its status or character may be or become at some later date. (*Leavenworth, Lawrence and Galveston Railroad Company v. United States*, 92 U. S., 733; *Perkins v. Central Pacific Railroad Company*, 1 L. D., 336; *Central Pacific Railroad Company v. Painter*, 6 L. D., 485; *Northern Pacific R. R. Co. v. Kerry*, 10 L. D., 290; *Oregon and California Railroad Company v. Barrett*, 12 L. D., 232; *Northern Pacific Railroad Company v. Loeber*, 38 L. D., 217.)

If, therefore, the tracts here in controversy were properly adjudicated by the land department to be mineral in character in 1880, they must, in the very nature of things, have been mineral at the inception of the company's grant, and, being then mineral, were, under the authorities above cited, absolutely and forever excepted from its operation, regardless of what their present character may be. That adjudication is not in any degree impeached or impaired by anything subsequently transpiring, and stands today as the last determination by the land department of the character of these lands at the time the grant to the company under the act became effective. The land having been thus adjudicated to have been mineral in 1880, and, by the later decisions, to be, as a present fact, nonmineral, the

presumption necessarily arises that during the period that intervened between the dates of the hearings upon which said adjudications were, respectively, based, the mineral thereon had been exhausted; and, indeed, the conclusion that such was, in fact, the case finds support in the record of the later hearing. It follows, therefore, that, be the present character of the land what it may, the company, on the existing state of the record, has not now, and never had, any right, title or interest therein or thereto under its grant, and hence is not concerned in any disposition the Department may seek to make thereof to any other person. The judgment below is accordingly affirmed.

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**SOLDIERS' AND SAILORS' HOMESTEAD RIGHTS.**

**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., October 11, 1910.*

**SOLDIERS' AND SAILORS' HOMESTEAD RIGHTS.**

Any officer, soldier, seaman, or marine, who served for not less than ninety days in the army or navy of the United States during the civil war and who was honorably discharged and has remained loyal to the Government, and who makes a homestead entry, is entitled under section 2305 of the Revised Statutes to have the term of his service in the army or navy, not exceeding four years, deducted from the period of five years' residence required under the homestead laws.

If the party was discharged from the service on account of wounds or disabilities incurred in the line of duty, the whole term of enlistment, not exceeding four years, is to be deducted from the homestead period of five years; but no patent can issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he commenced his improvements. (Sec. 2305, Rev. Stat.)

Similar provisions are made in the acts of June 16, 1898 (30 Stat., 473), and March 1, 1901 (31 Stat., 847), for the benefit of like persons who served in the late war with Spain, or during the suppression of the insurrection in the Philippines.

No credit for military service can be allowed where commutation proof is submitted.

A party claiming the benefit of his military service must file with the register and receiver a certified copy of his certificate of discharge, showing when he enlisted, when he was discharged, and the organiza-

tion in which he served; or the affidavit of two respectable, disinterested witnesses, corroborative of the allegations contained in his affidavit on these points, or, if neither can be procured, his own affidavit to that effect.

PERIODS OF SERVICE FOR WHICH CREDIT MAY BE GIVEN IN LIEU OF  
RESIDENCE.

In determining the rights of parties under Sections 2304-2309 of the Revised Statutes, the civil war is held to have lasted from April 15, 1861, to August 20, 1866; the Spanish war and Philippine insurrection from April 21, 1898, to July 15, 1903.

No credit for military service can be given unless a soldier or sailor served for at least ninety days between the dates above mentioned.

In computing the period of service of a soldier "who has served in the Army of the United States," within the meaning of that phrase as used in Sec. 2304 of the Revised Statutes, the entrance of the soldier into the Army will be considered as dating from his muster into the service and not from his enlistment.

An entryman having enlisted and served ninety days during any one of the wars above mentioned is entitled under Sec. 2305 of the Revised Statutes to credit for the full term of his service under that enlistment, although such term did not expire until after the war ceased.

A person who served for less than ninety days in the army or navy of the United States during said wars is not entitled to have credit for military service on the required period of residence upon his homestead, although he may have been discharged for disability incurred in line of duty.

A person serving in the army or navy of the United States may make a homestead entry if some member of his family is residing upon the land applied for, and the application and accompanying affidavits may be executed before the officer commanding the branch of the service in which he is engaged. Such soldier or sailor is not required to reside personally upon the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is five years old, or until it has been commuted.

After an entryman under the enlarged homestead act of February 19, 1909 (35 Stat., 639), or the act of June 17, 1910 (36 Stat., 531), relating to Idaho, has resided upon the land embraced in his entry for such period, not less than one year, as will, with the term of his military service during the wars above mentioned, constitute five years, further residence need not be continued, but cultivation must be continued for the period required under said acts. Persons who may be entitled to leave the land after they have resided thereon for such period as, with their military service, amounts to five years,

should not, however, do so without keeping the register and receiver of the local land office informed of their addresses so that in the event of contest they may be notified to defend their interests.

HOMESTEAD RIGHTS OF WIDOWS AND MINOR ORPHAN CHILDREN OF  
DECEASED SOLDIERS AND SAILORS.

If a soldier or sailor makes an entry, or files a declaratory statement, and dies before perfecting the same, the right to perfect the claim, including the right to claim credit for the soldier's military service, passes to the persons named in Sec. 2291, Revised Statutes, that is, to his widow, or if there be no widow, to his heirs or devisees.

In case of the death of any person who would be entitled to a homestead under the provisions of section 2304 of the Revised Statutes, but who died prior to the initiation of a claim thereunder, his widow, or in case of her death or remarriage, his minor orphan children, by a guardian, duly appointed and officially accredited at the Department of the Interior, may make the filing and entry in the same manner that the soldier or sailor might have done, subject to all the provisions of the homestead laws in respect to settlement and improvement; and the whole term of service, or in case of death during the term of enlistment, the entire period of enlistment in the military or naval service shall be deducted from the time otherwise required to perfect the title to the same extent as might have been allowed the soldier. (Sec. 2307, Rev. Stat.)

Where a homestead entry is made under section 2307, Revised Statutes, by the widow or minor orphan children of a deceased soldier or sailor, compliance with law both as to residence and improvement is required to be shown to the same extent as would have been required of the soldier or sailor in making entry under section 2304, Revised Statutes, except that credit will be given upon the five-year period for the entire term of the enlistment where the soldier or sailor died during the term of his enlistment. See departmental decision in case of Anna Bowes (32 L. D., 331).

In case of widows, the prescribed evidence of military service of the husband must be furnished, with affidavit of widowhood, giving the date of her husband's death.

In case of minor orphan children, in addition to the prescribed evidence of military service of the father, proof of death or remarriage of the mother must be furnished. Evidence of death may be the testimony of two witnesses or a physician's certificate, duly attested. Evidence of marriage may be certified copy of marriage certificate, or of record of same, or testimony of two witnesses to the marriage ceremony.

Minor orphan children must make a joint entry through their duly appointed guardian, who must file certified copies of the powers of guardianship, which must be transmitted to the General Land Office by the registers and receivers.

#### SOLDIERS' DECLARATORY STATEMENTS.

Soldiers' and sailors' declaratory statements may be filed in the land office for the district in which the lands desired are located by any person entitled to the benefits of Secs. 2304 and 2307, Rev. Stat., as explained above. Declaratory statements of this character may be filed either in person, or through an agent acting under power of attorney, but the entry must be made in person, and not through an agent, within six months from the filing of the declaratory statement, and residence must also be established within that time.

The party entitled to file a declaratory statement, may make entry in person, without filing a declaratory statement, if he so desires.

The soldiers' declaratory statement, if filed in person, must be accompanied by the prescribed evidence of military service and the oath of the person filing the same, stating his residence and postoffice address, and setting forth that the claim is made for his exclusive use and benefit for the purpose of actual settlement and cultivation and not, either directly or indirectly, for the use or benefit of any other person; that he has not heretofore made a homestead entry, or filed a declaratory statement under the homestead law (or if he has done so, he must show his qualifications to make a second or additional homestead entry); that he is not the proprietor of more than 160 acres of land in any State or Territory; and that since August 30, 1890, he has not entered or acquired title under the agricultural land laws of the United States, nor is he now claiming under said laws, a quantity of land, which with the tracts applied for would make more than 320 acres, or, in the case of a claim under the enlarged homestead laws, 480 acres.

In case of filing a soldier's declaratory statement by agent, the oath must further declare the name and authority of the agent and the date of the power of attorney, or other instrument creating the agency, adding that the name of the agent was inserted therein before its execution. It should also state in terms that the agent has no right or interest, direct or indirect, in the filing of such declaratory statement.

The agent must file (in addition to his power of attorney) his own oath to the effect that he has no interest, either present or prospective, direct or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby

said agent has been empowered at any future time to sell or relinquish such claim, either as agent or by filing an original relinquishment of the claimant.

Where a soldier's declaratory statement is filed in person, the affidavit of the soldier or sailor must be sworn to before either the register or the receiver, or before a United States commissioner, or a United States court commissioner, or judge, or clerk of a court of record in the county or land district in which the land sought is situated. Where a declaratory statement is filed by an agent, the agent's affidavit must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer having a seal and authorized to administer oaths generally, and not necessarily within the land district in which the land is situated.

The fee to be paid to the register and receiver of the land office where the declaratory statement is filed is \$2.00, except in the Pacific States and Territories, where it is \$3.00.

A homestead entry under a declaratory statement can not be made through an agent, and the entry must be made, and settlement on the land commenced, within six months after the filing of the declaratory statement, and the party must continue to reside on the land and cultivate it for such period as, added to his military service, will make five years. But he must actually reside upon the land at least one year, whatever may have been the period of his military or naval service.

The filing of a declaratory statement will not be held to bar the admission of filings and entries by others, but any person making entry or claim during the period allowed by law for the entry of the soldier, will do so subject to his right; and the soldier's application, when offered within such time, will be allowed as a matter of right and the intervening claimant will be notified and afforded an opportunity to be heard.

As implied by the requirements of the oath, a soldier will be held to have exhausted his homestead right by the filing of his declaratory statement; it being manifest that the right to file is a privilege granted to soldiers in addition to the ordinary privilege only in the matter of giving them power to hold their claims for six months after selection before entry, but is not a license to abandon such selection with the right thereafter to make a regular homestead entry independently of such filing. This is clear from the statutory language. Sec. 2304 provides: "A settler shall be allowed six months after locating his homestead and filing his declaratory statement in which to make entry and commence his settlement and improvement;" and Sec. 2309 requires him "in person" to "make his actual entry, commence settlement and improvement on the same, and thereafter fulfill all

the requirements of the law." These must be done on the same lands selected and located by the filing.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

JESSE E. WILSON,  
*Acting Secretary.*

CONTESTS AGAINST ENTRIES EMBRACED WITHIN RECLAMATION WITHDRAWALS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., October 15, 1910.*

THE HONORABLE THE SECRETARY OF THE INTERIOR,

SIR: In compliance with the instructions contained in your letter of October 11, 1910, it is respectfully recommended that paragraphs 19 and 20 of the circular approved May 31, 1910 (38 L. D., 620), be amended so as to read as follows:

19. No contest will be allowed against any entry embracing land included within the area of any first-form withdrawal of land reserved for irrigation purposes, commonly known as land under the second form of withdrawal, until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges, and the date when the water can be applied and made public announcement of the same, and in all cases where a contest has been allowed prior to such withdrawals, the withdrawal, if made before the termination of the contest, will *ipso facto* terminate all right that was acquired by reason of such contest. In cases where contest has been allowed as to entries on second form lands, the act of Congress approved June 25, 1910 (Public, No. 289), precludes entry by successful contestants until the lands are restored to the public domain or platted to farm units and covered by public notice under section 4 of the reclamation act. If the approval of the act preceded the termination of the contest, all rights thereunder were *ipso facto* terminated by the act, but in all cases where a preference right has been gained by virtue of a successful contest, terminated before the withdrawal of the land or the passage of the said act, the successful contestant may exercise his right and make entry at any time within thirty days from notice that the lands involved have been restored to the public domain, or covered by public notice and made subject to entry, but, in the latter event, his entry must be made subject to the limitations, charges and conditions imposed by the reclamation act.

20. Any entry of land embraced within the area of a second-form withdrawal may be contested after farm units have been established covering such entry and public notice has issued in connection with the same, fixing the water charges and the date when water can be applied, and if at the date of entry by the successful contestant the lands have not been released from the withdrawal under the provisions of the reclamation act, his entry will be subject to the limitations, charges and conditions imposed by that act.



The recognition of preference right in successful contestants, where contests have terminated prior to the withdrawal of the lands involved is in accordance with the present practice and the exercise of that right is provided for in a manner similar to that set forth in the circular of June 6, 1905 (33 L. D., 607).

It is respectfully recommended that you attach your approval to this letter and cause it to be returned to this office.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved, October 19, 1910:

R. A. BALLINGER, *Secretary*.

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**HOMESTEAD ENTRY WITHIN RECLAMATION PROJECT—ASSIGNMENT—  
ACT OF JUNE 23, 1910.**

SARAH S. LONG.

*Decided October 19, 1910.*

Where a homestead entry within a reclamation project is divided into farm units, the entryman is entitled to retain only one of such units, to be designated by him; and as to the remaining units the entry must be canceled, or, where satisfactory final proof has been submitted, assignment thereof may be made under the provisions of the act of June 23, 1910.

Where farm units have been established within a reclamation project, they become the smallest legal subdivisions subject to disposition, and assignments of lands within the project under the act of June 23, 1910, can thereafter be made only in accordance with such subdivisions.

To entitle one to take by assignment under the act of June 23, 1910, he must show that he has not acquired title to and is not claiming any other farm unit or entry under the reclamation act.

BALLINGER, *Secretary*:

Motion for review of decision of July 19, 1910 (not reported), affirming the action of the Commissioner of March 23, 1910, requiring Sarah S. Long to conform her homestead entry, made August 26, 1907, under the reclamation act of June 17, 1902 (32 Stat., 388), for the NE.  $\frac{1}{4}$  of Sec. 12, T. 3 N., R. 5 W., Boise, Idaho, land district, so as to embrace only farm unit "A", comprising the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of said section, or to farm unit "B", comprising the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of said section.

The entrywoman, who is the widow of a soldier entitled to credit for military service rendered during the civil war, submitted final proof as to residence January 26, 1909, which was accepted subject to further compliance with the reclamation act as to payment of the government charges and reclamation of one-half of the irrigable area.

It appears from the final proofs that claimant has built upon farm unit "A" a substantial house, fenced the entire 160 acres, cleared a large portion of the land of sagebrush; that she has placed improvements of the value of \$250 on farm unit "B", and of the value of about \$550 on farm unit "A".

It is urged that the Department can not, after final proof, by the establishment of farm units, reduce the area of this entrywoman's holdings, because such action would result in taking valuable improvements without compensation. It is further contended that, inasmuch as claimant had the right, after making final proof, to assign the entry, she should be accorded the right to hold the same; and that if it be decided that she may not hold the entry in its entirety, she should at least be allowed to assign one of the farm units and hold the other.

Since the rendition of the Commissioner's decision, and subsequent to the previous submission of the case for determination, the act of June 23, 1910 (36 Stat., 592), was passed, which provides:

That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands, and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.

In the instructions of September 13, 1910 (39 L. D., 202), under said act, it was stated that:

Such assignments, if made prior to the establishment of farm units, must be made in strict accordance with the legal subdivisions of the public survey, and if made after such units are established must conform thereto.

The legislation referred to was not considered in decision under review, and, in the light thereof, said decision is modified, and the entrywoman will be allowed sixty days from notice hereof within which to elect which of the farm units she will retain, whereupon the entry will be conformed accordingly and cancelled as to the remainder; or, she may, within the time specified, transfer one of the units to a qualified assignee. In absence of action by the entrywoman as here directed within the time specified, the entry will be conformed to farm unit "A" and cancelled as to farm unit "B," and the case remanded to the General Land Office for appropriate action.

In this connection, it is deemed appropriate to express the views of the Department in reference to two matters which, while not directly

presented at the present time, are likely to arise in the future progress of the instant, as well as in numerous other cases.

By the act quoted an entry within a reclamation project may be assigned in whole or in part, "subject to the limitations, charges, terms and conditions of the reclamation act." Public land can be disposed of only according to the plat of survey, in parcels not smaller than the "smallest legal subdivision," and section 2289, R. S., requires homestead entries to be made "in conformity to the legal subdivisions of the public lands." This rule is practically one of administrative necessity, which has always been adhered to in departmental regulations and decisions. Its application to the administration of the reclamation act, where each unit is established with a view to its irrigation as a whole, is especially important. Manifestly the scheme of reclamation would be seriously interfered with by indiscriminate subdivision, without regard to irrigation plans. The fact that farm units may embrace more than one subdivision, as established by the original survey, does not affect the rule, because the old survey is superseded, the farm unit having become the "smallest legal subdivision," subject to disposition.

It is further held that, as the reclamation act limits the right of entry to *one* farm unit, an assignee must present a showing that he has not acquired title to and is not claiming any other farm unit or entry under the reclamation act.

It is directed that general instructions be prepared in accordance with the views herein expressed.

#### MINING CLAIM—PLACER LOCATION—CHARACTER OF LAND.

##### AMERICAN SMELTING AND REFINING COMPANY.

*Decided October 19, 1910.*

A single discovery of mineral sufficient to authorize the location of a placer claim does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land is open to investigation and determination by the land department at any time until patent has issued.

In determining the character of land embraced in a placer location, ten-acre tracts, normally in square form, are the units of investigation and determination; and if any such area is found to be nonmineral, it should be eliminated from the claim.

BALLINGER, *Secretary*:

This case arises upon certiorari to the Commissioner of the General Land Office, petition for which was granted by the Department August 18, 1910. The Commissioner has transmitted the entire record for departmental consideration.

The company contends that the Commissioner, on June 24, 1910, erroneously refused to receive and transmit its appeal to the Department from the order, issued May 2, 1910, directing proceedings in accordance with the circular of November 25, 1907 (36 L. D., 178), on the charge, based upon an adverse report by a special agent, that certain land, specifically described by 10-acre tracts, in each of the placer mining claims named below (except the American No. 2 and the Lime King No. 2 locations, which were not attacked), "is nonmineral in character." It is urged that the order directing a hearing is unwarranted and should be annulled. An additional argument and an affidavit, tending to show the mineral character of all the land, have recently been filed.

May 1, 1909, the company filed mineral application, No. 03349, for the American Nos. 1-5 and the Lime King Nos. 2, 3, 5 and 6 placer locations, each embracing 160 acres, except the Lime King No. 6, which covers 155-194 acres, survey No. 5704, Salt Lake City, Utah, land district. The application stated that the locations contained "placer deposits of limestone."

It appears that on July 23, 1909, the company applied to purchase and thereafter the purchase price was paid, as per receipt No. 294,427. The local officers having dismissed an adverse claim and refused reinstatement thereof, on October 15, 1909, transmitted the papers to the Commissioner "for final action on rejection of said adverse claim." April 13, 1910, the Commissioner affirmed their action. The register's final certificate of entry has not yet been issued.

Of the total area applied for, namely, 1,425.194 acres, it is charged that over one-third, or 517.6 acres, consisting of 10 acres in the American location, 90 acres in the American No. 5, 30 acres in the Lime King No. 3, 130 acres in the American No. 3, 70 acres in the American No. 4, 100 acres in the Lime King No. 5, and 87.6 acres in the Lime King No. 6, are not mineral lands.

In support of its position it is argued on behalf of the company that as lack of discovery, compliance with law, and good faith are not charged, those matters are conceded, and hence each location is supported by a discovery, and embraces in part concededly mineral land, and that such being the case, each location, being an entirety, must be presumed to embrace only mineral land. With this the Department can not agree.

An essentially similar contention was urged in the case of *Ferrell et al. v. Hoge et al.*, on review (29 L. D., 12), and was there conclusively answered. In that case the contention and the discussion were as follows:—

2. That one discovery of mineral within its limits was sufficient to establish the mineral character of the entire claim to such an extent that no one could be heard to allege that any part is non-mineral.

\* \* \* \* \*

The second proposition was practically rejected by the decision under review, but it is insisted by the mineral claimants that that decision and the rule announced in the Union Oil Company case (25 L. D., 351), can not both stand and that if the former prevails it is a repudiation of the latter.

There is no such conflict. In both decisions it is held that one discovery upon a claim, whether it be of twenty acres or of one hundred and sixty acres, is sufficient to authorize a placer location thereof, but in neither case is it held, either directly or by intendment, that such discovery is conclusive as to the mineral character of the entire claim, or that all the land therein can be acquired as appurtenant to the mineral deposits in the portion containing the discovery.

\* \* \* \* \*

Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is discovered in any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of non-mineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these mineral claimants were sustained.

Mr. Lindley, in his work *On Mines* (2d Ed., p. 783), says:

It has been claimed where there is a valid discovery within a one-hundred-and-sixty-acre tract taken by an association of persons, that this discovery would be sufficient to hold the entire area irrespective of the character of the land elsewhere therein, upon the theory applied in cases of lode claims, that surface ground is given for the convenient working of the claim. The department held this not to be the correct rule. Ground selected as placer must be mineral land, non-mineral surface not being permitted as an incident to a placer claim.

It is elementary that only mineral lands are subject to disposition under the mining laws. When the question of the character of land is raised it must be tried out, and until patent has been issued the question as to the character of land at the date of entry is an open one, subject to investigation and determination by the land department.

It is further contended that 20-acre tracts should be made the unit of investigation and elimination. The statute, mining regulations, and decisions clearly contemplate that a placer location may be made of a 10-acre tract in square form. If such a tract, whether in a location by itself or included with other such tracts in a maximum location, is proven to be nonplacer ground, such tract can not pass to entry and patent under the placer application,

In brief, among other things, counsel say:

We have stated before, and again insist, that it is not necessary for a placer or lode claimant, except in the presence of conflicting agricultural claim, to make more than one discovery on a location, and to require any additional showing as to the continuity of the vein or placer deposit is subversive of the law and of the uniform holdings of the land department for many many years.

The Department does not agree with counsel in the suggested analogy between lode and placer claims when the character of the land embraced in such claims is called in question. The lode claim embraces a definite tract of land, but the lode discovered therein is the principal thing, and surface ground is incidental and appurtenant thereto and may or may not contain lode mineral. The ground containing the placer mineral deposit is the subject of the placer location. A single placer discovery does not impress the entire area that may be embraced within the location with a placer character, if it be shown as a matter of fact that a definite portion thereof is nonplacer.

In addition to the authorities already herein cited, attention is called to the following excerpt from the subject of placer locations contained in Morrison's Mining Rights, 12th edition, page 197:

But it is clear from the implied requirement of knowledge or discovery of mineral character, that the ground about to be located must have a special value as either placer proper or for some special deposit treated as placer ground under the statute, and that merely surveying and recording vacant land as and for placer ground without known value under either class is a void proceeding when properly contested or attacked.

In Costigan on Mining Law (1908), page 162, it is said:

Discovery is as essential to the validity of placer claims as to that of lode claims. There must be a discovery for each claim; but, where a location of 160 acres as a placer is made by an association of persons, one discovery will hold the whole 160 acres, *subject to inquiry by the land department into the mineral character of the different included acres.* (Italics borrowed.)

In the case of the Snow Flake Fraction Placer (37 L. D., 250, 253) the Department said:

In the Hogan and Idaho Placer Mining Claims (34 L. D., 42), also located upon unsurveyed lands, the Department held that, inasmuch as tracts as small as ten acres in area, in square form, are recognized as legal subdivisions under the mining laws, a necessary inclusion therein of some non-placer land, as the result of compliance with the requirement of conformity, would not affect the validity of the claim if the land so embraced would be as a whole more valuable for placer mining than for agricultural purposes. . . . The Department reaffirms the decision in this case in so far as it holds that the necessary inclusion of some non-placer land as the result of compliance with the requirement of conformity, does not affect the validity of the placer claim if the lands so embraced would be as a whole more valuable for placer mining than for agricultural purposes,

Paragraph 60 of the mining regulations (37 L. D., 728, 769), among other things, states:

the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits . . . . If it is a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why same by him is regarded as a valuable mineral claim. . . . .

Local land officers are instructed that if the proofs submitted in placer applications under this paragraph are not satisfactory as showing the land as a whole to be placer in character, or if the claims impinge upon or embrace water courses or bodies of water, and thus raise a doubt as to the *bona fides* of the location and application, or the character and extent of the deposit claimed thereunder, to call for further evidence, or if deemed necessary, request the specific attention of the Chief of Field Service thereto in connection with the usual notification to him under the circular instructions of April 24, 1907, and suspend further action on the application until a report thereon is received from the field officer.

The regulations further provide:

105. At hearings to determine the character of lands the claimants and witnesses will be thoroughly examined with regard to the character of the land; . . . whether any placer mine or mines exist upon the land; if so, what is the character thereof; . . . upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all. . . . .

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

Substantially similar provisions in relation to ten-acre tracts have been embodied in the mining regulations ever since the passage of the act of May 10, 1872 (17 Stat., 91). See regulations of July 26, 1901 (31 L. D., 453, 491); June 24, 1899 (28 L. D., 579, 611); December 15, 1897 (25 L. D., 563, 593); December 10, 1891, Lindley on Mines, 1st Edition, 1182, 1213; April 1, 1879, Sickles Mining Laws, 524, 548; February 1, 1877, Weeks on Mineral Laws, 404, 416; June 10, 1872, Copps' Mining Decisions, 270, 287. In the regulations last cited the following language is used:

Authority is given for the subdivision of 40-acre legal subdivisions into ten-acre lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

It is held, therefore, that under a proper construction of the law, these ten-acre lots in mining districts, should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering may make entry thereof, after the usual proceedings, without further survey or plat.

In the case of *Ferrell et al. v. Hoge et al.* (27 L. D., 129), it was held (syllabus) :

One discovery of mineral is a sufficient basis for a placer location of one hundred and sixty acres by an association; but if it is subsequently shown that any area of such claim, amounting to a legal subdivision, does not contain, or is not valuable for mineral, such land must be excluded from the entry.

In accordance with the foregoing it has been the practice of the land department to order hearings upon protest charging the non-mineral character of lands embraced in applications for placer patents and to investigate and determine the actual character of such lands, when called in question, and to eliminate the adjudged non-mineral land from the placer claim by rejecting the placer application or cancelling the entry *pro tanto*.

After a careful scrutiny of the entire record, the Department fails to find that the Commissioner acted arbitrarily or abused the discretion vested in him when he ordered the hearing now called in question. An order for hearing being discretionary and interlocutory is not appealable, and the Commissioner's action in declining to receive and forward the attempted appeal herein was proper and correct.

The case is accordingly remanded for further appropriate proceedings.

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**WISCONSIN CENTRAL RAILROAD SETTLERS—EXTENT OF RELIEF  
GRANTED BY CONGRESS.**

LEOPOLD BAUER (ON REREVIEW).

*Decided October 20, 1910.*

The act of April 19, 1904, section 6 of the act of May 29, 1908, and the joint resolution of June 25, 1910, providing for the relief of certain homestead settlers within conflicting railroad grants in the State of Wisconsin, do not authorize such settlers to exchange the lands entered by them in Wisconsin for other public lands, or grant a scrip right, but contemplate merely that in making homestead entries of other lands the entrymen shall be entitled to credit for the time spent and improvements made on the Wisconsin lands.

**BALLINGER, Secretary:**

This case is again before the Department on the petition of Leopold Bauer invoking the supervisory authority of the Secretary of the Interior and asking a reconsideration of the Department's decisions of February 21, and September 19, 1910 (38 L. D., 460; 39 L. D., 221), denying his right to acquire title to lot 7, the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and lot 9 of Sec. 14, and lot 3 of Sec. 23, T. 4 N., R. 93 W., Glenwood Springs, Colorado, land district, under a homestead entry made on December 8, 1908.



Under departmental order of October 22, 1891, effective November 2, following, all lands in the Ashland, Wisconsin, land district, under withdrawals theretofore made and held for indemnity purposes under the grants for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, were restored to the public domain and opened to settlement and entry under the general land laws. June 12, 1893, Bauer made homestead entry No. 3369 at Ashland, Wisconsin, for 120 acres of land in Sec. 17, T. 46 N., R. 4 W., said tract being a portion of the land restored by the above-mentioned order. The Supreme Court in the case of Wisconsin Central Railroad Co. v. Forsythe (159 U. S., 46), by decision rendered June 3, 1895, determined that the lands involved belonged to the Wisconsin Central Railroad Company, and Bauer's entry was accordingly held for cancellation by the General Land Office November 13, 1895, and, pursuant to a notice and order to show cause, served on Bauer November 26, 1895, said entry was finally canceled March 24, 1896. The fees and commissions paid on this entry were ordered refunded December 10, 1904.

By section six of the act of May 29, 1908 (35 Stat., 465), it was provided:

That all qualified homesteaders who, under an order issued by the Land Department bearing date October twenty-second, eighteen hundred and ninety-one, and taking effect November second, eighteen hundred and ninety-one, made settlement upon and improved any portion of an odd-numbered section within the conflicting limits of the grants made in aid of the construction of the Chicago, Saint Paul, Minneapolis and Omaha Railway and the Wisconsin Central Railroad and were thereafter prevented from completing title to the land so settled upon and improved by reason of the decision of the Supreme Court in the case of Wisconsin Central Railroad Company against Forsythe (one hundred and fifty-ninth United States, page forty-six), shall, in making final proof upon homestead entries made for other lands, be given credit for the period of their bona fide residence upon and the amount of their improvements made on the lands for which they were unable to complete title. In the event that any entryman entitled to the benefits of this act, shall have died the right to make such second entry shall inure to his surviving widow, and if there be no widow living then to his minor child or children, if any, in the manner hereinbefore provided: *Provided*, That no such person shall be entitled to the benefits of this act who shall fail to make entry within two years after the passage of this act: *And provided further*, That this act shall not be considered as entitling any person to make another homestead entry who shall have received the benefits of the homestead law since being prevented, as aforesaid, from completing title to the lands as aforesaid settled upon and improved by him.

On the date of the passage of this act a contract was entered into by which Bauer agreed to sell to one B. B. Jones all his right, title, and interest in and to the lands to which he, Bauer, might become entitled under said act, and on December 8, 1908, admittedly in pursuance to such agreement, there was filed in the local land office at

Glenwood Springs, Colorado, an application in Bauer's name to enter, as a homestead, the tracts above described in the Glenwood Springs land district, at which time there were also submitted certain so-called proofs to the effect that Bauer had established residence on the land in Wisconsin and had continued to reside thereon and improve the same from the year 1893; upon the filing of which, together with certain additional evidence respecting the publication of notice, etc., the local office at Glenwood Springs, on February 16, 1909, issued final certificate No. 01073, reciting that the entry was allowed under the instructions contained in the circular of June 9, 1908.

The Commissioner of the General Land Office in his decision of November 26, 1909, held that Bauer did not make the entry of Colorado lands for his own use and benefit but for the benefit of Jones, pursuant to the agreement referred to; that he never established nor maintained residence on the land in Colorado, and never cultivated the same; that he was not entitled to credit for any residence maintained upon the Wisconsin lands beyond the date of receipt by him of notice of the cancellation of the entry thereof because of conflict with the railroad company, a period of less than three years.

An appeal having been taken to the Department from the commissioner's decision it was held in the decision of February 21, 1910, that Bauer was not entitled to credit for residence on the Wisconsin land beyond November 26, 1895; that on that date he had not completed such a period of residence as would, accompanied by appropriate cultivation and improvement, have vested in him a vendible interest had the land belonged to the government; that the Colorado entry was made pursuant to a contract contrary to the policy of the homestead laws, and was accordingly void (38 L. D., 460).

In a motion filed by Bauer for review of the Department's decision of February 21, 1910, attention was directed to a joint resolution approved by the President June 25, 1910 (36 Stat., 885), which reads as follows:

That in computing the time for which credit shall be given to the homestead settlers, their widows or minor heirs, under the provisions of section six of the Act of May twenty-ninth, nineteen hundred and eight, entitled "An Act authorizing the resurvey of certain townships in the State of Wyoming, and for other purposes," credit shall be given for the full period of actual residence upon the lands to which they were unable to complete title: *Provided*, That such credit shall not extend beyond the date of judgments in ejectment against such settlers rendered by the courts.

Sec. 2. That the limitation of time in which second entries may be made under section six of the Act aforesaid shall be extended for the period of twelve months from the date of the passage of this resolution.

It was contended that this joint resolution was intended to validate, and did validate, the class of entries of which that made by Bauer was one. Respecting this contention it was held by the Department

in its decision of September 19, 1910, that on June 25, 1910, the same day on which the resolution was approved by the President, it received the consideration of the Department, and in a communication of that date addressed to the President, the Secretary expressed the view that if it were the purpose of the joint resolution to validate Bauer's entry, and similar entries, it signally failed in that purpose.

In the course of that letter it was stated that it was well known to the Department that Mr. B. B. Jones was largely instrumental in securing the passage of the resolution under consideration, presumably with an idea that it would validate his contracts with the Wisconsin settlers, above referred to; that if the resolution would have that effect the Department could not too strongly recommend its veto, but, in the opinion of the Department, no such effect could be given to the resolution, for the reason that the section of the act of 1908, amended by the resolution, would merely permit the crediting of residence "upon homestead entries made for other lands," and in the making and perfecting of such an entry the homesteader would be required to show that such entry was made for his own exclusive benefit and not in the interest of another.

Bauer's motion for review was accordingly denied, upon which he has filed this petition invoking the supervisory authority of the Secretary of the Interior asking a reconsideration of the entire matter.

It is urged in the motion that the Department failed to give proper consideration to the joint resolution approved June 25, 1910; that it was the purpose of such resolution to validate the entry in question, and the Department had no authority to disregard the solemn declaration of Congress. As to the authority of the Department to reconsider the case and grant the relief prayed, reference is made to the decision of the Supreme Court in the case of *Knight v. United States Land Association* (142 U. S., 161, 181); quoting from the language of the same court in the case of *Williams v. United States* (138 U. S., 514, 524), wherein it was said:

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are entrusted to the Land Department, matters not foreseen, equities not anticipated and which are therefore not provided for by express statute, may sometimes arise, and therefore the Secretary of the Interior is given that superintending and supervisory power which will enable him in the case of these contingencies to do justice.

In disposing of this case it is proper to note that Congress has three times legislated respecting the homestead settlers on the lands found to belong to the Wisconsin Central Railroad Company. The first act was passed April 19, 1904 (33 Stat., 184); the second was the act of May 29, *supra*, and the third was the joint resolution of June 25, of the present year.

In none of these laws is authority granted to homestead settlers to exchange the lands entered by them in Wisconsin for other lands of

the United States. It is simply provided that in making homestead entries of other lands the entryman shall be entitled to credit for the time spent and improvements made on the Wisconsin lands. By the joint resolution of June 25, this is held to mean that settlers should be entitled to credit for such residence maintained after the decision of the Supreme Court was rendered until they were actually ejected on the suit of the railroad company.

The homestead law not only requires a person seeking its benefits to settle upon, cultivate, and improve the land entered, but at the end of seven years the entryman is required to submit proof of his residence, cultivation and improvement, at which time he is also required to pay certain fees and commissions fixed by law. The making of this proof and the payment of these fees and commissions are as much required by law as is the residence upon the land involved. The record in this case shows that Bauer, while he may have resided upon the land and cultivated the same for more than five years, nevertheless did not attempt to make any final proof of such compliance until long after his Wisconsin entry had been canceled. The proof attempted to be made by Bauer in the year 1904 before the Ashland, Wisconsin, office, was without any legal effect whatever because at that time his entry had been canceled, the land had been awarded to the railroad company, and the register and receiver at Ashland had no jurisdiction whatever over the subject-matter.

As stated above, the acts passed by Congress for the relief of the Wisconsin settlers gave them certain benefits and privileges in connection with making homestead entries for other lands. The homestead entryman is required to make oath that the entry he makes is for his own exclusive use and benefit and not for the purpose of speculation, and that he has not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person, corporation or syndicate, by which the title which he may acquire from the government of the United States shall inure in whole or in part to the benefit of any person except himself. The homesteader is also required to personally examine the land entered. The record in this case shows that Bauer could not make the affidavit required of homestead entrymen at the time of presenting his application at Glenwood Springs land office for the lands in question. He had made an agreement with Jones whereby Jones was to acquire absolute title to the land entered upon the payment of \$200. The non-mineral affidavit made in support of the entry was not made by Bauer, and it appears from an affidavit executed by him that he knew nothing at all about the character of the land for which he made his application.

The reference to the Supreme Court decision in the case of *Knight v. United States Land Association*, *supra*, is without force, because

Congress has seen fit to legislate respecting the subject-matter of this case, and it is presumed that in so legislating Congress has granted all the benefits to which it believes the settlers are entitled. If Congress had intended to authorize the exchange of the lands and grant a mere scrip right, as is claimed by the petitioner, suitable and plain language to that effect would have been employed. The matter having, therefore, been specially considered by Congress and a measure of relief granted, this Department is bound thereby and is without authority to grant further equitable relief.

The joint resolution of June 25, is not a meaningless, senseless and wholly useless resolution, as argued in the motion, because it specifically authorizes this Department to recognize residence on the Wisconsin lands up to the date of the ejectment of the settlers therefrom, and it also extends the time during which the benefits of the act of May 29, 1908, may be acquired for one year from the date of the joint resolution.

The entire matter considered, the petition must be denied.

#### APPLICATIONS FOR RIGHTS OF WAY FOR IRRIGATION PURPOSES.

##### INSTRUCTIONS.

Approvals of applications for right of way under the act of March 3, 1891, as amended by the act of May 11, 1898, for primary purposes of irrigation, are subject to all valid existing rights and upon the express condition that the right of way be used for the main purpose of irrigation; that any electrical power or energy developed thereunder is to be primarily used for the purpose of irrigation; and any abandonment or violation of such use, or neglect to comply with the provisions of the law, will work a forfeiture which will be enforced by appropriate proceedings.

*Secretary Ballinger to the Commissioner of the General Land Office, October 20, 1910.*

In connection with the application of the Ramona Power & Irrigation Company for a right of way over lands in the State of California under the provisions of the act of March 3, 1891, the attention of the President was directed to the case in order to obtain an expression of his views as to the policy which should be adopted in cases of applications for rights of way under the act of 1891, *supra*, as amended by the act of May 11, 1898 (30 Stat., 404), where the primary and principal use of the right of way is sought for the purpose of irrigation, but where there is involved a development of electrical power or energy for the purpose of pumping water to lands from streams, reservoirs or wells. The President has expressed himself in the case submitted as of the opinion that the application should be

granted upon the express condition that the right of way is sought and approved for the main purpose of irrigation, and that the power uses are subsidiary to and mainly for the purpose of serving and carrying out irrigation.

Accordingly, the application of the Ramona Company has been approved by letter of even date in the following form:

Approved; subject to all valid existing rights and upon the express condition that the right of way hereby approved is to be used for the main purpose of irrigation; that any electrical power or energy developed thereunder is to be primarily used in and for the purpose for which the right of way is granted, *viz.*, irrigation; and any abandonment or violation of such use, or neglect to comply with the provisions of the law, will work a forfeiture which will be enforced by appropriate proceedings.

You will promptly take up for consideration all such rights of way now pending in your office and, in cooperation with the Director of the Geological Survey, cause a field investigation and report to be made upon each application by a competent engineer of your office, or of the Survey, and thereafter transmit the entire record to the Department with the joint or separate recommendations of yourself and the Director of the Geological Survey.

The same procedure will be followed in case of such applications hereafter presented. In *all* cases the investigation and report should cover all material facts pertaining to the lands and rights applied for, including irrigation, contemplated and possible, the power possibilities and whether the application is for the main purpose of irrigation.

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**GRAVEL AND SAND DEPOSITS—CHARACTER OF LAND—HOMESTEAD ENTRY.**

**ZIMMERMAN *v.* BRUNSON.**

*Decided October 21, 1910.*

Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes.

**BALLINGER, *Secretary:***

This is an appeal from the decision of the Commissioner of the General Land Office reversing the recommendation of the register and receiver, and holding for cancellation homestead entry No. 05196, made March 1, 1909, at Great Falls, Montana, by Albert E.

Brunson, for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 1, T. 28 N., R. 3 W., M. M., as to the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , on the contest of William Zimmerman, filed April 30, 1909, charging that the above described 20 acres are—

wholly unfit for agricultural purposes; that it is of gravel character, and there was a long time prior to the filing of homestead entry No. 05196 in favor of Albert E. Brunson a gravel and sand pit operated upon said land; said Brunson had knowledge and was aware of the gravel character and the uses and purposes which said land was, and now is being subjected to with reference to the operation of the said sand and gravel pit, prior to his filing his homestead application above mentioned; and the said Brunson at the present time and since the filing aforesaid permits said sand and gravel pit to be operated on said land, and the said land is valuable for its gravel deposits.

The register and receiver recommended that the contest be dismissed, and concluded their opinion as follows:

We are of the opinion that the evidence fails to establish the contention that the portion of this entry involved in this contest is more valuable for its deposits of gravel and sand than it is for agricultural purposes. The evidence shows that while some gravel had been hauled from the land in question for building purposes, it was also found and used in several different locations in that vicinity, and no attempt was made to secure title to the land in question for a gravel pit, but it was simply used while it was public land.

The Commissioner found that the tract contained workable deposits of sand and gravel valuable in the manufacture of building concrete, both solid and in blocks, for use in foundations and superstructures, and that the land was therefore mineral in character, and excepted from homestead entry.

The evidence of the contestant is to the effect that the tract is worthless for agricultural purposes, can neither be dry-farmed nor irrigated, its sole value being for its deposit of gravel and sand. That it has some value for grazing purposes is conceded. His testimony further shows that gravel taken from the land since 1908 has been used, when mixed with cement, for the purpose of making concrete and concrete blocks used in the construction of buildings in the town of Conrad, Montana. The principal value of the deposit is due to its proximity to that town.

The contestee's testimony tends to show that all except about two acres can successfully be dry-farmed; that the tract can be irrigated; that the gravel and sand is of a poor quality, being mixed with dirt, and that a portion of the gravel used in the town of Conrad came from another source of supply, locally known as Dry Fork, where there is a large amount of sand and gravel available for the same purpose, and of a better quality. He does not deny that prior to his entry gravel was removed from this land and used in the construction of buildings in Conrad, but contends that it is valueless upon the

ground, the hauling alone placing the value thereon. Zimmerman apparently staked out a so-called placer claim, but never filed the same of record.

Conceding that the 20 acres are chiefly valuable for their deposit of gravel and sand which can be used in connection with cement forming concrete used in the construction of buildings, does such a deposit confer upon them a mineral character so as to except them from homestead entry?

Under section 2302, Revised Statutes, mineral lands are not liable to entry and settlement under the provisions of the homestead laws. Section 2318 reserved lands "valuable for minerals" from sale, and section 2319 declares that "all valuable mineral deposits" in the public lands are free and open to exploration and purchase under the provisions of the mining laws.

The question of what constitutes "mineral" within the meaning of the above statutes is not free from doubt, and has frequently been before the Department for adjudication. In *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.* (25 L. D., 233), the Department laid down the general rule that—

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.

In *Conlin v. Kelly* (12 L. D., 1) it was held that stone useful only for general building purposes did not render land containing it subject to appropriation under the mining laws, and except it from preemption entries. On page 3 the Department pointed out that the stone had no peculiar property or characteristic giving it a special value, and that its chief value was its proximity to the town of Alexandria. So here, the sand and gravel have no peculiar property or characteristic, and their chief value is their proximity to the town of Conrad.

That case was distinguished in *McGlenn v. Wienbroer* (15 L. D., 370), the Department pointing out, at page 374, that in the *Conlin v.*



Kelly case the stone was valuable only for general building purposes, while there it was very valuable for ornamentation of buildings, and for monuments and other commercial purposes. In *Clark et al. v. Ervin* (16 L. D., 122), the holding in *Conlin v. Kelly* was reaffirmed; while the distinction pointed out in *McGlenn v. Wienbroe* was emphasized in *Van Doren v. Plested* (16 L. D., 508). The above cases, it should be observed, involved a state of facts existing prior to the act of August 4, 1892 (27 Stat., 348), authorizing the entry of lands chiefly valuable for building stone under the placer mining laws.

In *Dunluce Placer Mine* (6 L. D., 761) it was held that a deposit of brick clay will not warrant the classification of land as mineral, or entry thereof as a placer claim. This holding was affirmed in *King et al. v. Bradford* (31 L. D., 108), the facts being stated on page 109 as follows:

1. That the land in controversy is of very little value for agricultural purposes.
2. That no substance heretofore regarded as mineral by the Department exists therein.
3. That said land contains a deposit of ordinary clay from which an inferior quality of brick have been manufactured, which have been used in the erection of ordinary buildings and in the construction of a sewer in Butte City, Montana, in the immediate vicinity of said land.
4. That the brick so made have been sold at a profit in Butte City.
5. That said land is more valuable for the manufacture of such brick than for agricultural purposes.

There, again, a material valuable solely for general building purposes, and whose chief value was its proximity to a town or city, was held not to be a mineral.

From the above resume it follows that the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

It is true that the nonmineral affidavit required of the homestead entryman required him to state that the land did not contain any deposit of "coal, placer, cement, gravel, \* \* \* nor any other valuable mineral deposit." The word "gravel" there used refers rather to gravels bearing gold or other metallic substances, giving the gravel a peculiar value therefor.

The decision of the Commissioner is therefore reversed, and Brunson's entry will remain intact, if no other objection appear.

**NORTHERN PACIFIC RAILROAD GRANT—MINERAL INDEMNITY—COAL LANDS.****NORTHERN PACIFIC RY. CO.**

*Decided October 24, 1910.*

Lands classified as coal lands may be disposed of only under the coal-land laws, and are not subject to indemnity selection by the Northern Pacific Railway Company under the act of July 2, 1864, in lieu of mineral lands lost to the company's grant.

*Query:* Are unclassified coal lands "agricultural lands" within the meaning of the act of July 2, 1864, and subject to indemnity selection on account of mineral losses?

**BALLINGER, *Secretary:***

This is an appeal by the Northern Pacific Railway Company from a decision of the General Land Office of March 19, 1910, rejecting the company's application per list 146, filed September 11, 1909, for certain lands in the Bozeman land district, Montana. The lands involved may be grouped in three different classes, as follows:

1. Lands withdrawn for power sites August 19, 1909.
2. Lands withdrawn with a view to their classification under the coal land laws April 3, 1909.
3. Lands classified as coal lands at \$20 and \$30 per acre.

The appeal being limited to "error in holding that coal lands are not subject to selection by the company in lieu of mineral losses within its place limits," consideration of the ruling as to the lands covered by groups 1 and 2 is unnecessary. As to group 3, the rejection was put upon the ground that the lands, having been classified as coal in character, were not subject to railway indemnity selection to satisfy mineral losses, the indemnity privilege in such cases being confined to "agricultural lands."

The lands involved are within the first indemnity limits of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat., 365, 368), the material provisions of which are as follows:

*Provided, further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal.

While it is apparently admitted by counsel for the company that the precise question here involved is new, it is submitted that, under the ordinary indemnity privilege conferred by other provisions of the same section of said act on account of losses other than mineral, it has been, and is, a uniform rule of administration in the General

Land Office that coal lands may be selected in lieu of such losses, and argued that, construing the act as a whole, there is no plausible reason for applying a different rule to selections on account of mineral losses.

The Commissioner of the General Land Office has not stated, and the argument upon the appeal does not reach, the effect of what are conceived to be the controlling features of this case.

These lands were withdrawn for the purpose of classification under the coal land laws. They were classified as coal lands, and restored to disposition under such laws only. Admitting, for the sake of argument, that the great body of so-called coal lands not classified as such may be subject to railway indemnity selections of this character because no duty may be imposed upon the land department to inquire whether such lands are chiefly valuable for coal, and that such department may assume, without inquiry, that such unclassified lands are agricultural lands, within the meaning of the act, yet, it seems clear, that when, before selection be proffered, the lands have been withdrawn and classified and a price fixed for their sale, this procedure operates to prevent a disposition of such lands in any manner, or under any law, other than that under which they were withdrawn and classified. They are set apart for a special use, or, rather, a special disposition, and every tract so set apart is reserved to the Government to enable it to enforce the conditions imposed upon such disposition. Of course, the railway company, as any other claimant for lands classified as coal lands, may, under authorized procedure, dispute such classification, and would be entitled to a hearing to show that said lands are more valuable for agricultural purposes than for the coal which they contain; but so long as such classification stands, these lands are not subject to disposition other than under the coal land laws.

In this view, it will not be necessary to now decide the question whether, ordinarily, unclassified coal lands are "agricultural lands" within the meaning of the proviso hereinbefore quoted, or whether such lands are in general available to satisfy mineral or other losses within the place limits of the Northern Pacific Railway Company's grant. In this connection, however, it may not be improper to say that the ordinary, or general, indemnity privilege accorded by said act is to cover losses of lands which "shall have been granted, sold, reserved, occupied by homesteaders, or preempted, or otherwise disposed of," at the date of the definite location of the road, and is confined to "other lands," designated by odd numbers, and within certain defined limits. This privilege is a very different one from that accorded on account of mineral losses, which, as has been seen, is in terms limited to "agricultural lands," admitting that, as coal lands in place pass under the granting clause of the act, it is reason-

able to assume that it was intended to confer upon the company the right to select coal lands as "other lands" under the indemnity privilege, it by no means follows that such lands are "agricultural lands," subject to selection on account of mineral losses. Indeed, it would seem that, if Congress had intended to make the indemnity privilege on account of mineral losses the same as for other losses, there was no necessity for a separate provision excepting mineral lands from the grant, and special provision for indemnity privilege on account of such losses. The different bases of loss and indemnity, instead of being treated as separate and independent propositions, might have just as well been covered by a general provision, and subjected to the same rule of administration.

The decision appealed from is affirmed.

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**GRANT OF PUBLIC LANDS FOR PARK PURPOSES—ACT OF JUNE 7, 1910.**

**REGULATIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., October 25, 1910.

The act of June 7, 1910 (36 Stat., 459), provides:

That there is hereby granted and conveyed to the following-named municipal corporations in the State of Colorado, for public park purposes and for the use and benefit of the respective cities and towns, the following described lands, or so much thereof as said cities and towns may desire.

A description of the land granted to each town then follows. The towns and cities therein named are Glenwood Springs, Rifle, Grand Valley, Meeker, Steamboat Springs, De Beque, Collbran, Fruita, Montrose, Olathe, Gunnison, Pitkin, Durango, Dolores, and La Veta.

The second section of said act provides for the conveyance to said cities and towns of "the said land or such portions thereof as they may select, respectively," upon payment of \$1.25 per acre—

to have and to hold for public park purposes, subject to the existing laws and regulations concerning public parks, and that the grant hereby made shall not include any lands which at the date of the issuance of patent shall be covered by a valid, existing, *bona fide* right or claim initiated under the laws of the United States: *Provided*, That there shall be reserved to the United States all oil, coal, and other mineral deposits that may be found in the land so granted, and all necessary use of the land for extracting the same: *And provided further*, That said cities and towns shall not have the right to sell or convey the lands herein granted, or any parts thereof, or to devote the same to any other purpose than as hereinbefore described; and that if the said lands shall not be used as public parks, the same, or such parts thereof not so used, shall revert to the United States.

July 28, 1910, a survey was ordered of the lands described in the grants to the towns of Rifle and Grand Valley and the City of Durango, or of such portion of the land as the municipalities may severally select. Until such surveys have been made no action can be taken by said municipalities for the entry of the land under the act.

The land, if surveyed, shall be selected by the towns, respectively, by government subdivisions, and the corporate authority applying to enter the tract selected under the grant to the municipality must file therewith a notice of intention to make proof, and thereupon a notice for publication must be issued, published, and posted at the expense of the municipality, as in other cases, and all in manner and form and for the time provided in the act of March 3, 1879 (20 Stat., 472), and the regulations thereunder.

The proof will be made before the register and receiver of the proper land office, or any officer duly authorized by law, and must show:

*First.* The due publication of the register's notice of making proof.

*Second.* The official character of the officer making the application and his express authority to do so conferred by action of the board of trustees or common council of the municipality, which action should also describe the tract selected.

*Third.* A copy of the record, certified by the officer having charge thereof, showing the due incorporation of the city or town, or if incorporated by legislative enactment, a citation to the act.

*Fourth.* The testimony of the applicant and two of the published witnesses to the effect that the land applied for is vacant and unappropriated by any other party.

Should the local officers find the proof sufficient in all respects, they will issue a cash entry to the municipality in its corporate name for the land selected, upon payment of \$1.25 per acre therefor.

The granting clause in the certificate should be in substance as follows:

Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office, the said town (or city) of \_\_\_\_\_, Colorado, shall be entitled to a patent for the tract of land above described, but reserving therefrom to the United States all oil, coal, and other mineral deposits that may be found in the land, and all necessary use of the land for extracting the same; to have and to hold the land for public park purposes, subject to the existing laws and regulations concerning public parks; and further subject to all the restrictions, conditions, reservations, purposes, and reversions in said act expressed.

FRED DENNETT, *Commissioner.*

Approved, October 25, 1910:

R. A. BALLINGER, *Secretary.*

**NORTHERN PACIFIC ADJUSTMENT—SELECTION UNDER ACT OF JULY 1,  
1898—SUPPLEMENTAL SELECTION.****WILLIAM R. FOX.***Decided October 25, 1910.*

Where part of the land selected by an individual claimant under the provisions of the act of July 1, 1898, as extended by the act of May 17, 1906, in lieu of a completed claim, is relinquished by claimant to avoid conflict with a prior right, he may be permitted to make supplemental selection of an equal amount of land, which need not be contiguous to nor in the same land district as the land embraced in the original selection.

**BALLINGER, *Secretary*:**

This is an appeal on behalf of William R. Fox, by W. G. Howell, his attorney in fact, from a decision of the Commissioner of the General Land Office of April 13, 1910, holding for cancellation a selection by Fox under the act of July 1, 1898 (30 Stat., 597, 620), as extended by the act of May 17, 1906 (34 Stat., 197), of the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 36, T. 5 N., R. 4 E., Vancouver land district, Washington.

The land in controversy, being a section 36, was part of the State's school land grant, but it appears that on May 21, 1900, after the filing of the township plat of survey, one Janey M. Galbreath was permitted to make homestead entry for the entire SW.  $\frac{1}{4}$  of said section, upon an allegation of settlement prior to survey in the field; that on September 22, 1900, she submitted her final proof, against which protest by the State of Washington was, after hearing, sustained. The State having, in the meantime, however, been permitted to select school land indemnity in lieu of the land covered by said homestead entry, per list No. 23, approved July 19, 1907, it was held that the State's claim became thereby eliminated, and that the tract became subject to disposition under the public land laws. (*State v. Galbreath*, decided Dec. 28, 1908.)

Such being the status of the tract, Fox, by W. G. Howell, attorney in fact, on June 2, 1909, selected it as supplemental to selection made by him at Seattle, Washington, for other lands then unsurveyed, which had been canceled in part for conflict with the homestead claim of one John Van Rooy, the basis of the Fox selection being as follows:

Fox had a claim to 160 acres of land upon which satisfactory final proof had been submitted, but which conflicted with the grant to the Northern Pacific Railway Company. He was, therefore, entitled to, and, upon his election, was accorded, a transfer right under the act of 1898, as extended by the act of 1906, which he located upon certain lands in the Seattle land district, Washington. The latter, to the extent of forty acres, was defeated by conflict with the prior homestead claim of Van Rooy, thus leaving him entitled to a supplemental

selection of forty acres in satisfaction of such transfer right, which he located on the land here in question.

The General Land Office, in the decision appealed from, held that, inasmuch as the forty acres covered by the supplemental selection were not in the same land district as the original selection, the same could not be permitted to stand, and accorded the selector the privilege of withdrawing the same and making new selection covering lands in the Seattle district, failing in which, the subsisting selection in the Seattle district would be considered in full satisfaction of his right to make lieu selection.

Under the unusual facts and circumstances presented by this case, the Department can not concur in this conclusion. The precise question has never been decided by the Department.

In the case of Emil S. Wangenheim (28 L. D., 291), involving an exchange of land under the act of June 4, 1897 (30 Stat., 11, 36), it was held that where title to the land relinquished had passed out of the Government, or where certificate for patent thereto had issued, the selection might embrace either contiguous or noncontiguous tracts, *in the same land district*. In the case of James A. Bryars (34 L. D., 517), relied on in support of the conclusion of the General Land Office herein, it was held that an entryman who had completed entry under the commutation provisions of the homestead law and received final certificate could, in the exercise of the privilege accorded by the act of February 24, 1905 (33 Stat., 813), make second homestead entry of noncontiguous lands, provided the land so entered was within the same land district. More directly in point is the case of William M. Slusher (38 L. D., 326), wherein it was held that a selection by an individual claimant, in lieu of an uncompleted claim relinquished under the provisions of the act of July 1, 1898, must be confined to land in one compact body, in conformity with the law under which the original claim was initiated, but that selection in lieu of a *completed* claim might be made of noncontiguous tracts, *provided it is confined to one transaction and to lands in the same land district*.

The effect of the determination in all these cases is that a completed claim may be transferred to noncontiguous tracts, provided it is confined to one transaction and to land in the same land district.

In none of them, however, is the reason of the rule laid down, which, it is conceived, is one of administration only. There is nothing in the law specifically prohibiting the location of the unsatisfied balance of a supplemental claim of the character here in question upon lands situate in a district other than that in which the original selection was made, and no reason, other than one of administration, is suggested as to why the entry should be confined to the same land district. This being true, under the facts of this case the rule must give way. The land originally selected by the claimant was in a

compact body, and all the land covered thereby was in the same land district. He had complied with the letter of the rule of administration, and it was through no fault of his that he was not enabled to perfect his claim. He lost forty acres of the claim because of the unforeseen circumstance that it was covered by the prior homestead claim of another. Rather than dispute the priority of this claim, he elected to relinquish the same and perfect title to the remainder. It is not believed that this action operated to satisfy his right under the law, and, inasmuch as he must make another entry to fully satisfy such right, it is not perceived what difference it makes, either as a principle of law or a rule of administration, whether such additional or supplemental entry be made in the Seattle land district, or elsewhere.

The decision appealed from is reversed, and the case remanded for proceedings not inconsistent with this decision.

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**BOARD OF EQUITABLE ADJUDICATION—AMENDMENT OF RULES.**

**REGULATIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., October 17, 1910.*

Rules 28, 29, 30, 32, and 33 for the government of the Commissioner of the General Land Office in the submission of entries to the Board of Equitable Adjudication under section 2450, Revised Statutes of the United States, adopted May 12, 1888 (6 L. D., 799), and April 24, 1890 (10 L. D., 502), are hereby amended as follows:

28. All desert land entries made by a duly qualified party under the act of March 3, 1877, and the subsequent acts additional to and amendatory of the same, including all such entries which have been assigned to a party duly qualified to be recognized as an assignee, where the land was properly subject to entry under the law and has been reclaimed, and one-eighth of it cultivated, substantially as required by said statutes, but where any of the declarations, affidavits, or proofs required under said statutes were omitted, or are defective, and where, on account of the death or absence of the claimant, or his assignors, the missing papers can not be supplied, or the defective papers amended, and where there is no adverse claim.

29. All desert land entries in which the final proof and payment were not made within four years from the date of entry, or within such additional period as may have been granted in the particular case in pursuance of statutory provisions, but in which the entryman (and the assignee, if the entry has been assigned), were duly qualified, the land properly subject to entry under the statutes, and subse-



quently reclaimed and one-eighth of it cultivated in due time, according to their requirements, in which the failure to make final proof and payment in due time is satisfactorily explained as being the result of ignorance, accident, or mistake, or other sufficient reason not indicating bad faith, and in which there is no adverse claim.

30. All desert land entries in which the claimant has failed to reclaim or to cultivate the land and to make final proof and payment, as required by the statutes, within four years from date of entry, or within such additional time as may have been granted him, or to which he may have been entitled, under the statutes, but where the entryman (and assignee, if the entry has been assigned), were duly qualified, the land properly subject to entry under the statutes, and actual compliance with the legal requirements as to reclamation, cultivation, acquisition of water rights, and citizenship of claimant is satisfactorily established by the final proof, and the failure to reclaim the land and to cultivate one-eighth of it in time is satisfactorily explained as being the result of ignorance, accident, or mistake, or of obstacles which the claimant could not control, and where there is no adverse claim.

32. All homestead, timber and stone, and timber culture entries in which the party has shown good faith, and a substantial compliance with the legal requirements of residence and cultivation of the land, in homestead entries, or the required planting, cultivating, and protecting of the timber, in timber culture entries, but in which the party did not, through ignorance of the law, or other sufficient reason not indicating bad faith, declare his intention to become a citizen of the United States until after he had made his entry, or, in homestead entries, did not from like cause perfect citizenship until after the making of final proof, and in which there is no adverse claim.

33. All homestead and timber culture entries in which good faith appears, and a substantial compliance with law, and in which there is no adverse claim, but in which full compliance with law was not effected, or final proof made, within the period prescribed by statute, and in which such failure was caused by any sufficient reason not indicating bad faith.

An additional rule is established as follows:

Rule 34. All homestead entries in which the final affidavit and proof testimony of claimant, and all desert land entries in which the claimant's deposition or any affidavit required of him as a part of the final proof is taken at his residence or outside of the county or land district in which the land is situated, on account of illness, or in which, in case of the death of entryman, the heirs competent to make proof are prevented by great distance or the lack of means from appearing before a proper officer within such county or land district to give their testimony, and in which compliance with law in other

respects is shown, and all entries of isolated tracts sold at public sale under Sec. 2455 R. S., as amended, wherein compliance with one or more legal requirements with reference to the published notice does not appear in the papers, because of the neglect or inattention of the district land officers in allowing the sale to be made notwithstanding such defect, but where, in fact, notice was given and no adverse claim appears.

FRED DENNETT,

*Commissioner of the General Land Office.*

We concur in the rules as amended and in the additional rule.

JESSE E. WILSON,

*Acting Secretary of the Interior.*

GEO. W. WICKERSHAM,

*Attorney-General.*

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**ALASKA COAL LANDS—PAYMENT PENDING PROTEST.**

**OPINION.**

The payment required by section 2 of the act of April 28, 1904, to be made by locators of Alaska coal lands, as a condition precedent to patent therefor, need not be made, in cases where protest is filed, until after the termination of the protest.

*Attorney-General Wickersham to the Secretary of the Interior,  
October 18, 1910.*

I am in receipt of your letter of October 10th advising me that, under the act of April 28, 1904 (33 Stat., 525), it becomes necessary in order to secure a patent for coal lands in the District of Alaska, that the locator of such lands, or his assigns, present an application therefor within three years from the date of his location, accompanying his application by a certified copy of the plat of survey and the field notes thereof; and that it is also necessary that he make payment for the lands in the sum of ten dollars per acre; that upon the filing of such application the applicant is required to post and publish a notice of his application for a period of sixty days, and to furnish proof thereof; that during the period of publication, or within six months thereafter, adverse claims may be filed, upon which an action to quiet title must be begun within sixty days after the filing, and in such event, no patent shall issue until the final adjudication of the rights of the parties, and then only in conformity with the final decree.

You call my attention, also, to regulations issued by your Department on July 18, 1904 (33 L. D., 114), shortly after the passage of

the act of Congress above referred to, which provided, among other things, that—

Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre, specified by the act.

You further state that in the uniform administration of this law, as well as of the general mining law, after which this law of 1904 appears to have been patterned, payment of the purchase price has not been required at the time of filing the application for patent, nor until a fixed time after the expiration of the period of publication, and, in the event of the filing of objections, or of an adverse claim, not until a fixed time after the termination of proceedings thereupon. You say that, in many instances, protests under departmental regulations have been filed, in order that coal claims within the District of Alaska may be investigated, but that the agent who has filed the protest has not been prepared to file definite charges, and that the six months' period established under the departmental regulations for the payment of the purchase price following the expiration of the period of publication will shortly expire in a number of cases wherein protests have been filed by Government agents; and that the question has therefore arisen as to whether the claimant, under the law and the departmental regulations, is required to make his payment before the proceedings under the Government's protest have terminated.

The regulations cited clearly do not require payment of the price per acre, specified by the act, to be made at any definite time. It is "not *earlier* than six months after the expiration of the period of publication" that payment is required to be made, where no objections are interposed; and the revised regulations of April 12, 1907 (35 L. D., 673), provide that in case of the filing of an adverse claim within the time prescribed by the statute—

all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until final adjudication of the rights of the parties.

I take it that the real question which you desire to present is whether or not the statute itself, independently of the regulations, requires payment to be made prior to the termination of the contest over the entry. Mr. Assistant Attorney General Lawler in an opinion which you transmit to me with your letter [see p. 327], discusses very fully the question whether or not such payment is required by the regulations to be made prior to the termination of a contest over a disputed entry, reaching the conclusion that it is not so required. For the reasons stated by him I entirely concur in his conclusion that

the time covered by any actual suspension of the Alaskan coal land application under any form of proceeding, including a field service report or protest, pursuant to instructions either of April 24th, 1907, or May 16th, 1907, *supra*, during which period final entry can not properly be allowed, should not be charged against an applicant as a part of the six months' period prescribed for the submission of proof and the making of payment by your instructions of June 27th, 1908, cited in his opinion. It appears unnecessary to add anything to Mr. Lawler's discussion of the subject, except to observe that he deals in his opinion principally with a construction of the various regulations promulgated by the General Land Office from time to time, and lays little stress upon the provisions of the act of Congress.

Section 2 of the act of April 28, 1904 (33 Stat., 525), is as follows:

Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Looking at the structure of this section, there can be no question that a payment of the sum of ten dollars per acre for the lands applied for is a condition precedent to patent. But the act is ambiguous, to say the least, with respect to the time of payment. It enacts that the locator "shall receive a patent to the lands located by presenting . . . to the register and receiver . . . an application therefor, accompanied by a certified copy of plat of survey and field notes thereof, made by . . . and a payment of the sum of ten dollars per acre for the lands applied for." Undoubtedly the application must be *accompanied* by a certified copy of a plat of survey and field notes. The words "and a payment" do not naturally refer back to the words "accompanied by" as their antecedent. The natural antecedents of the word payment are "shall receive a patent," the preposition "upon" being implied before the word payment. That is to

say that the patent shall issue upon application accompanied by a certified copy of plat of survey and field notes and upon payment of the sum of ten dollars per acre. A different construction would make the statute read the locator shall receive a patent by presenting an application accompanied by certified copy of plat of survey and field notes and by presenting payment, etc.

But even conceding that the statute means that the application shall be accompanied by payment of the sum of ten dollars, it readily yields to the view that although the provisions for application, certified copy of plat, etc., and payment are *mandatory*, the *time* for payment of the sum named is *directory* only. It is particularly this class of statutes, *i. e.*, those defining procedure by public officers, that are more apt to be held directory than mandatory.

Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; *and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute.* [Sutherland on Statutory Construction, Sec. 447.]

Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer. [*Id.*, Sec. 448.]

Mr. Endlich (on the Interpretation of Statutes) at paragraph 437, says:

In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statutes construed in the light of other rules of interpretation.

In other words, unless a fair consideration of the statute shows that the legislature intended compliance with the provisions in relation to the manner to be essential to the validity of the procedure, it is to be regarded as directory merely. [Jones v. State, 1 Kan., 273.]

The cases concerning the point of time at which an act is to be performed, whether by the public officer himself or by some private person with an obligation upon the part of the public officer to see that it is performed, establish that as a general rule the conditions of the statute must be met at such a time as is sufficient to fairly accomplish the purposes of the act. (See *People v. Cook*, 14 Barb., 259, 290.) The practical considerations pointed out by Mr. Lawler

seem to me to be more than sufficient to require the application of this principle of construction to the question under consideration.

To hold otherwise would be practically to forfeit the payment in case the contest resulted in withholding patent. Such a result is abhorrent to justice. A penalty must be expressly imposed and can never be extended by implication. (*Elliott v. East Pa. R. Co.*, 99 U. S., 573.) The timber and stone act of June 3, 1878 (20 Stat., 89), provides for a forfeiture of the money paid in case of false swearing in the application. No such provision is found in the Alaska coal act. It is true that in the case of *United States v. Trinidad Coal and Coke Co.*, 137 U. S., 160, Mr. Justice Harlan held that where the Government sues to annul patents fraudulently obtained under the general coal-land act, a tender of the purchase price is unnecessary. The same was held in *United States v. Minor*, 114 U. S., 233, as to a preemption claim of agricultural lands. In the first named case, Mr. Justice Harlan suggested an appropriation by Congress, and out of that suggestion arises the real reason why the tender need not, in fact cannot, be made, for after money is paid into the United States it cannot be withdrawn except by force of statutory authority. "No money shall be drawn from the treasury but in consequence of appropriations made by law." Constitution, Art. 1, Sec. 9, Cl. 7.

The constitution of the State of Texas contains exactly the same provision, and in *Texas v. Snyder*, 66 Tex., 687, it was held that in an action by the State to recover school lands fraudulently obtained, this constitutional provision precluded a tender of the purchase price.

The general coal-land laws, sections 2347-2351, R. S., provide that the applicant "shall, upon application to the register of the proper land office, have the right to enter . . . one hundred and sixty acres . . . upon payment to the receiver of not less than ten dollars per acre." There is no requirement here that the payment shall accompany the application. There is nothing to indicate that Congress intended more in this regard in the Alaska statute than in the general law. Of course, it is necessary that the copy of plat of survey and the field notes *accompany* the application, for without them the Land Office could not proceed to entertain the application for entry; but no such reason applies to the money payment.

The suspension of the limitation as to the time of payment by a contest or protest would appear to be but common justice. Mr. Lawler has pointed out the practical reasons for this and nothing need be added on that point except to say that the case of the *Menasha Woodenware Co. v. The Secretary of the Interior*, in the Supreme Court of the District of Columbia, and which is referred to by Mr. Lawler in his opinion, involved the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), which provides that the Secretary of the Interior shall issue patents within two years after

the issuance of the receiver's receipt in certain classes of entry not including coal lands, provided no "contest" or "protest" is pending. In the Menasha case Justice Stafford held that a mere charge of fraud or other irregularity by a special agent is a "protest" within the meaning of this statute. Until such a "protest" is withdrawn or sustained, no payment should in common fairness be required of the entryman unless clearly required by law to be made, and such clear requirement in my opinion is not contained in the Alaska coal act.

For these reasons, I concur in the opinion expressed by Mr. Lawler that payment is not required to be made by an entryman under the act of April 28, 1904 (33 Stat., 525), until the termination of the protest.

#### ALASKA COAL LANDS—PAYMENT PENDING PROTEST.

##### OPINION.

The time covered by any form of proceeding, including a field service report or protest, pursuant to instructions either of April 24, or May 16, 1907, during which period final entry can not properly be allowed, should not be charged against an Alaska coal land applicant as a part of the six months' period prescribed by the instructions of June 27, 1908, for the submission of proof and the making of payment.

*Assistant Attorney-General Lawler to the First Assistant Secretary of the Interior, October 10, 1910.*

You having requested my opinion as to the time when it is necessary to make payment of the purchase price for Alaska coal lands, particularly where the application for patent has been protested by the Field Service, I herein present a careful review of the situation.

The Alaska coal land act of April 28, 1904 (33 Stat., 525), in brief provides:

Section 1. That qualified persons may make locations of coal lands in Alaska and that notices of such locations shall be recorded.

Section 2. That qualified locators or their assigns "shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of the plat of survey and field notes thereof, . . . and a payment of the sum of \$10 per acre for the land applied for;" but that no application shall be allowed until notice thereof has been posted and published for sixty days and until after proof of such publication and posting and such other proof as is required by the coal land laws shall have been furnished.

Section 3. That during the period of publication or within six months thereafter adverse claims may be filed, upon which an action to quiet title must be begun within sixty days after filing, and that thereafter no patent shall issue until the final adjudication of the rights of the parties, and then only in conformity with the final decree.

Section 4. "That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska."

The regulations of July 18, 1904 (33 L. D., 114), pursuant to the act, among other things, provide:

Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act.

In the revised regulations of April 12, 1907 (35 L. D., 673), it is provided by section 16:

... Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act, which is \$10 per acre in all cases.

21. ... Upon the filing of an adverse claim within the time prescribed by the statute, all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until final adjudication of the rights of the parties.

24. ... Proof and payment by the assignee must be made, however, in the same manner and within the same time as though there had been no assignment.

Paragraph 7 of the circular of May 16, 1907 (35 L. D., 572), having specific relation to the withdrawal of Alaskan coal lands and the completion of claims initiated prior to such withdrawal, provides as follows:

In all cases where you publish notice of applications for entry or patent under the coal land laws, or under any other law, you will at once mail a copy of said notice to a special agent assigned to duty in Alaska. Should said agent thereafter file in your office a protest against the validity of the location or claim embraced in any such application, you will defer action upon such application until said protest is withdrawn or appropriate action taken thereon.

The instructions of June 27, 1908 (36 L. D., 548), conclude as follows:

Paragraph 16 of the regulations of April 12, 1907 (35 L. D., 673), provides that payment and entry may be made not earlier than six months after the expiration of the period of publication. The law does not contemplate that this time be extended an unreasonable period at the option of the claimant, but that after the filing of the application the case proceed regularly to entry. Accordingly, should the specified proofs and purchase price be not furnished and tendered within six months from the expiration of the six months within which adverse claims may be filed, or within six months after the final termination of



adverse proceedings instituted under section 3 of the act, you will reject the application subject to appeal: *Provided*: That the period of six months herein fixed within which to perfect entry shall be allowed in case of pending applications which have not been perfected within the ninety days specified by the instructions of March 3, 1908, the time to run from date hereof.

This is not intended in any way to modify the circular instructions of May 16, 1907 (35 L. D., 572), copy inclosed herewith.

The instructions of March 3, 1908, above mentioned, were superseded by those of June 27, 1908, *supra*, the effect of the change being to extend the period in which the claimant might submit proof and make payment from a period of ninety days, fixed in the former circular, to a period of six months, as contained in the quotation immediately above.

The act of May 28, 1908, to encourage the development of coal deposits in the Territory of Alaska (35 Stat., 424), provided that claims or locations might be consolidated into a single claim, location, or purchase, upon the condition and limitations prescribed by the act, and that locators or their heirs or assigns might form associations or corporations which might perfect entry or acquire title to such lands in accordance with the other provisions of law under which said locations were originally made.

Pursuant to said act the circular of instructions approved July 11, 1908 (37 L. D., 20), were promulgated. This last act did not effect any substantial change in the general procedure under the former act for the acquirement of title to Alaskan coal lands.

Incidentally, in connection with the regulations above set forth, attention is called to the instructions of April 24, 1907 (35 L. D., 681), which prescribe the action to be taken by special agents upon being furnished with a copy of notice to submit final proof or make final entry in all classes of cases. There is no substantial conflict between these regulations and paragraph 7 of instructions of May 16, 1907, *supra*.

It will be observed that none of the foregoing regulations undertakes to construe the act as requiring the deposit of the purchase price at the time of the filing of the application for patent; although a literal reading of the language of the statute might seem to point to such an inference. On the contrary, the regulations lead to the conclusion, by specific statements made therein, that the purchase money need be paid only when the record shall be clear, so that upon making proof and payment final entry may be allowed. There is no forfeiture of the money which the applicant may have paid prescribed by the Alaska coal land laws, as there is in section 2 of the timber and stone act of June 3, 1878 (20 Stat., 89). In making homestead commutation proof under section 2301, Revised Statutes, the homesteader is allowed ten days within which to pay the commutation price after receiving notice that his proof has been accepted. See last

proviso in section 4 of the act of March 2, 1907 (34 Stat., 1245), and paragraph 6 of circular of May 16, 1907 (35 L. D., 568, 570).

The Rules of Practice of the land department, by paragraph 53, provide:

The local officers will thereafter (after forwarding their report, together with testimony and opinion in a contest case, to the General Land Office) take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

In all cases, however, where contest has been brought against any entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims and the rules of the Department, submit final proof and complete the same, with the exception of the payment of purchase money or commissions, as the case may be; said final proof will be retained in the local land office, and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions, and final certificate will issue, without any further action on the part of the entryman, except the furnishing of a nonalienation affidavit by the entryman, or, in case of his death, by his legal representatives.

In such cases the party making the proof, at the time of submitting the same, will be required to pay the fees for reducing the testimony to writing.

It is not believed that anyone will seriously contend that in the face of a contest proceeding or a protest or adverse report which requires the ordering of a hearing and which, if sustained, will result in the final rejection of the coal land application, the applicant should be required to pay the purchase price for the land involved.

The primary purpose of the published notice is to bring in adverse claims, but such notice also advises all concerned of the fact that application has been filed and invites private protestants to bring forward objections to the application, if any they have. A good protest, until finally disposed of, is as effective in postponing the actual allowance of entry as the due filing and prosecution of an adverse claim under the statute. Where the copy of the published notice furnished the Chief of Field Division or Special Agent in charge is returned with the indorsement "protest against the validity of the location or claim," the register and receiver are precluded from allowing entry upon the application pending. It is true that the Chief of Field Division is instructed to exert every effort to make field examination prior to the date fixed for final proof. "If investigation is completed before date for final proof, he will so notify the register and receiver, by letter; but if investigation is unfavorable to entry, he will submit his report to this office." See paragraphs 8 and 9, instructions of April 24, 1907 (35 L. D., 681).

The local officers, however, have no knowledge of the contents of the unfavorable report whenever it may be made, and the claimant can not ascertain the charges preferred therein until regularly advised of the same pursuant to instructions from the General

Land Office and in accordance with the regulations promulgated. Consequently, the "protest" lodged by the field service against a pending application ties the hands of the local officers until the application is relieved therefrom just as securely and as effectually, so far as the allowance of the entry thereon, as would the filing of an adverse claim, and the claimant is absolutely precluded from making any move looking toward the immediate perfection of his application until that "protest" is withdrawn or otherwise disposed of by appropriate action.

As a concrete illustration of the possible situation, if it be held that the mere formal protest upon published notice does not relieve the applicant from paying the purchase price, the following might arise: Two coal claims, A and B, are applied for at the same time, and notices are issued, and in each case returned protested by the Chief of Field Division. Claim A has already been investigated, and an unfavorable report submitted to the General Land Office; while claim B has not been investigated, but is reported protested in order to secure time to make examination and report, and the unfavorable report is not submitted until after the six months' period for proof upon claim B has run. Claimant for claim A would not be in default because of the actual adverse report having been made, and claimant for claim B would suffer the outright rejection of his application at the expiration of the six months' period following the six months allowed for adverse claims, because no adverse report was filed during that time and because he had failed to come forward and tender proof and payment within the six months. Yet so far as either claimant or the local officers could know, the only difference in the situation of the claims is that a report had been filed in one case and not in the other. Such results are not consonant with common sense or good reason.

The returned published notice, indorsed "protested" by the Field Service, whether made for the purpose of securing time to investigate a suspicious application or claim, or whether based upon report or investigation already made, is clearly an *objection interposed* to the application within the terms of section 16 of the circular of April 12, 1907, *supra*, and is such a *protest* as requires the local officers to defer action upon the application until said protest is withdrawn or appropriate action is taken thereon within the purview of circular of May 16, 1907, *supra*. It can not reasonably be held that the circular of June 27, 1908, *supra*, was intended or did in any manner modify the other two circulars last above mentioned or supersede them. In fact, the circular of June 27, 1908, expressly disclaims any intent to modify the instructions of May 16, 1907.

Other considerations lead to a like conclusion. It has been held that investigation ordered by the Commissioner or a formal action

or proceeding initiated questioning the validity of an entry is a sufficient protest to defeat confirmation under the proviso of section 7 of the act of March 3, 1891 (26 Stat., 1095).

The proceedings are commenced from the time the investigation is ordered, and if commenced within the statutory period, it will suspend the running of the statute and defeat confirmation, whether notice of such action is given to such applicant or claimant within the period or not: [John N. Dickerson, 33 L. D., 498.]

In the case of *Menasha Wooden Ware Company* (37 L. D., 329), the Supreme Court of the District of Columbia held (syllabus) :

Any proceeding initiated by the land department before the expiration of two years from the issuance of final certificate, calculated to test the validity of an entry and the claimant's right to patent is sufficient to bar confirmation under the proviso to section 7 of the act of March 3, 1891.

See also the case of *F. M. Filter* (38 L. D., 34) and the cases there cited.

While under the present views entertained as to the scope of the confirmation statute, a coal entry would not be subject to confirmation, nevertheless if an action or notation is a protest for the purposes of the confirmation provisions in other classes of cases, that same action or notation equally should be treated as a sufficient protest in the situation under discussion.

Again, the practical administrative effect of the Field Service's formal protest placed on the published notice and filed in the local office is to suspend all action by the register and receiver on the application, and such application can not regularly be allowed to proceed to perfection by the allowance of entry until the protest lodged is duly disposed of, and while there is no formal order of suspension, the result of such protest is to produce a suspension of the application in fact.

There are numerous decisions to the effect that the period covered by the ordered suspension of an entry does not run against the lifetime of the entry; that is, the statutory period during which proof and payment must be made, and no contest can be successfully waged, based on the claimant's failure to comply with law during the period of such suspension.

In the case of *Adams v. Farrington* (15 L. D., 234) it was held (syllabus) :

During the pendency of a departmental order suspending an entry, the local office has no jurisdiction to entertain contest proceedings against such entry, and the subsequent approval of such action by the General Land Office, after the revocation of such order, will not give effect to such proceedings.

See also the cases of *United States v. Haggin* (12 L. D., 34); *Brunette v. Phillips* (22 L. D., 692), and *Porter v. Carlile* (34 L. D., 361).

In the case of *Buskirk v. Marlow*, decided by the Commissioner September 12, 1900, which involved an application to purchase coal lands pursuant to a preference right under the general coal land laws of the United States, said applicant being required by law to submit proof and make payment within fourteen months after the opening and improving of a mine upon the land, it was held that the filing and pendency of a contest operated to suspend the running of the statutory period, and that the declarant might submit final proof and payment within due time, exclusive of the period covered by the contest. This holding upon appeal was affirmed in unreported departmental decision of January 16, 1901.

The Alaska coal land act of April 28, 1904, *supra*, is modeled largely upon and is essentially similar to the general mining laws as to form of procedure. Under the mining statute, it is a well-established principle that any protest requiring action equally as well as an adverse claim postpones the required payment and entry of the land until the protest proceeding is finally closed.

Paragraph 57 of the mining regulations (37 L. D., 769), provides:

The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

The reason for this practice is discussed in the case of *Marburg Lode Mining Claim* (30 L. D., 202, 210), where the Department said:

The proceedings had on the protests since the termination of that suit (adverse suit) have, according to departmental practice, been equally effective to prevent the completion of the application for patent, as was the adverse suit prior to its dismissal. In each of the cited cases, failure by the applicant to seasonably press his application to completion was apparent, and during the existence of that failure other rights were claimed to have intervened. No such failure exists in this case, and there is no room for the application of the doctrine of laches. The law does not impute laches to a party because he has not done, nor offered to do, something which, even though he had made the offer, he would not have been allowed to do.

I am unable to perceive any good reason for applying a different rule of procedure to situations arising under the Alaska coal land laws in this particular respect than is and has been uniformly applied under the mining laws.

There is no duty imposed by Congress upon the land department to obtain the purchase price for Alaska coal lands in cases where it is not possible at the time of payment to allow entry for the land, nor is of weight the suggestion that the purchase price should be paid in order that if the claim be adjudged unlawful that money may be declared forfeited as a penalty or indirectly forfeited to the United

States because of the inability to make a refund thereof under the present repayment laws.

Because of the foregoing consideration I am clearly of the opinion and you are advised that the time covered by any actual suspension of an Alaska coal land application under any form of proceeding, including a Field Service report or protest, pursuant to instructions, either of April 24, 1907, or May 16, 1907, *supra*, during which period final entry can not properly be allowed, should not be charged against the applicant as a part of the six months' period prescribed for the submission of proof and making of payment by instructions of June 27, 1908.

#### RIGHTS OF WAY—CONFLICT WITH GOVERNMENT PROJECT.

##### INSTRUCTIONS.

Where the government has filed notice of appropriation and asserted its claim to the unappropriated waters of a stream, applications for rights of way in conflict with or detrimental to the government project, when such rights are based upon appropriations made, or use attempted to be initiated, subsequent to the assertion of the claim of the government, should not be allowed.

*Secretary Ballinger to the Commissioner of the General Land Office,  
October 21, 1910.*

My attention has been directed to a communication from the Reclamation Service stating that according to the best data available 25,000 acres are being irrigated in the Milk River Valley by private enterprise, and that the complete irrigation of this area will absorb the unregulated flow of the river. The reclamation of the lands within the government reclamation project in the Milk River Valley will depend upon the use of flood waters which must be stored during the nonirrigation season.

In 1902 the United States filed formal notices of appropriation with the authorities of the State of Montana, claiming all the unappropriated waters of the Milk River for this project, and since that time the Department has in various ways continued to assert its claims to all of the unappropriated waters of the Milk River. The Reclamation Service reports that, taking into consideration the requirements of the treaty with Canada, proclaimed May 13, 1910 (36 Stat., part 2, p. 312), and the acreage of public and private lands to be reclaimed within the United States reclamation project, the water supply will not be in excess of the reasonable requirements of the Milk River project.

I am informed that sixteen or seventeen applications for right of way for irrigation under the act of March 3, 1891 (26 Stat., 1095),

have been presented to this Department, four of which have been rejected, the remainder being at present undisposed of. I am also advised that similar conditions exist in other reclamation projects, and it becomes important to establish a rule for the disposition of such applications where they conflict with the claimed rights of the government and threaten the success of public reclamation projects.

The act of March 3, 1891, *supra*, and the regulations thereunder approved June 6, 1908 (36 L. D., 567), contemplate and require that *prima facie* evidence of the right to waters to be conveyed in or to the canals and reservoirs covered by the right of way sought, be furnished by the applicant, it not being contemplated that easements shall be granted where the applicant has no water to convey therein. In cases where the government has filed notices of appropriation and asserted its claims to the unappropriated waters of a stream, applications for rights of way in conflict with or detrimental to the government project, when such rights are based upon appropriations made, or use attempted to be initiated, subsequent to the assertion of the claims of the government, should not be allowed.

You will, therefore, as in the past, refer all such applications for right of way to the Director of the Reclamation Service for report, and that officer will report to you fully all the pertinent facts and circumstances attending the government project, including date, manner and extent of appropriation of waters by the United States, whether and how the right of way sought will conflict with the interests of the United States in the reclamation project in question and any other matters affecting or pertaining to the application in question. If, upon examination of the applications and the reports submitted thereon, you find that the right of way sought will conflict with the interests of the United States under its reclamation project and that the water appropriation, or use attempted to be initiated, by the applicant is subsequent in time to, and in conflict with, the claim of the United States thereto, the application will be rejected, subject to the right of appeal.

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**PLACER LOCATION—DISCOVERY—OIL SEEPAGE.**

**SOUTHWESTERN OIL CO. *v.* ATLANTIC AND PACIFIC R. R. CO.**

*Decided October 27, 1910.*

The disclosure of a stratum of bituminous sandstone or shale from which a small quantity of oil seeps, not sufficient to impress the land with any value for mining purposes, does not constitute a sufficient discovery to support a valid mining location.

**BALLINGER, *Secretary*:**

This case is before the Department on the appeal of the Southwestern Oil Company from the decision of the Commissioner of the

General Land Office of March 29, 1910, dismissing its protest against the patenting to the Atlantic and Pacific Railroad Company, of the NW.  $\frac{1}{4}$ , Sec. 7, T. 16 N., R. 15 W., and all of section 1 and the N.  $\frac{1}{2}$  of section 11, T. 16 N., R. 16 W., Santa Fe land district, New Mexico.

The tracts above described are within the primary limits of the grant to the Atlantic and Pacific Railroad Company under the act of July 27, 1866 (14 Stat., 292), and were listed by the company, as per lists Nos. 7 and 8, filed, respectively, June 30, 1891, and July 2, 1891.

Said protest was filed July 10, 1908, and charges, in substance and effect, that the tracts therein described were located by J. A. Lewandowski *et al.* on the 16th and 17th of October, 1907, as petroleum oil placer claims; that the locators made a valid discovery of mineral oil on the premises prior to the location, and that the tracts are chiefly valuable for oil mining purposes.

Hearing was had on the protest July 12, 1909, as result whereof the local officers found the land to be mineral in character, and recommended that the railroad company be denied a patent therefor. On appeal by the railroad company the Commissioner found that the protestant failed to show a valid discovery of oil upon any portion of any of the tracts, or that the same was of any value for mining purposes, and accordingly took the action here complained of.

The testimony adduced at the hearing is set out with sufficient fullness in the Commissioner's decision, and it will not, therefore, be here restated. Suffice it to say that it shows that there exists upon the land described a stratum of bituminous sandstone or shale, about six feet in thickness, from which, at several points on the land, a small quantity of oil seeps. It does not appear, however, that this product exists on the land in sufficient quantities to impress it with any value for mining purposes, nor is it shown that other deposits of oil in paying quantities exist thereon. The Department is also of opinion that the Commissioner correctly held that the disclosures made upon the land do not constitute a sufficient discovery to support a valid mining location.

In the appeal it is practically conceded that the evidence presented is insufficient to establish the existence of oil in workable quantities on the land, but it is contended that in view of the circumstances disclosed, a further opportunity should be afforded the protestant to establish, if it can, by the evidence of geologists and oil experts, the mineral character of the land. In this connection it is to be noted that by Executive order of November 9, 1907, a certain area in New Mexico was, subject only to existing valid rights of any person, withdrawn from sale and settlement, and set apart for the use of the Indians as an addition to the Navajo Reservation. By Executive



order of January 28, 1908, said order of November 9, 1907, was amended so as to embrace the entire townships wherein the tracts above described are situated. In view of said withdrawals, and of the manifest invalidity of the locations upon which the protestant bases its right to the land, the Department is unable to conceive what benefit would accrue to the protestant by affording it opportunity to be allowed to submit further evidence, as, in no event, in the presence of the withdrawal, could the protestant perfect its asserted claim to the land.

The decision appealed from is accordingly affirmed.

In the situation indicated by the record, however, the Department is of the opinion that a thorough field examination, preferably through the Director of the Geological Survey, should precede final action upon the railroad company's lists.

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THOMAS A. CUMMINGS.

Motion for re-review of departmental decision of July 15, 1910, 39 L. D., 93, adhered to on motion for review September 26, 1910, not reported, denied by Secretary Ballinger November 2, 1910.

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**WITHDRAWAL—AGRICULTURAL ENTRY—RESTRICTED PATENT.**

CONWAY ET AL. *v.* BROOKS.

*Decided November 4, 1910.*

A statement by the surveyor that "a good quality of lignite coal is found in several places in the northern part of the township," but making no reference to any specific tracts, can not be regarded as a classification, as coal land, of any particular tract lying in the northern portion of the township, so as to affect the validity of a homestead entry therefor; and upon subsequent withdrawal of the land for coal classification, subject to the provisions of the act of June 22, 1910, the entryman is entitled, upon the submission of satisfactory proof, if he so elect, to receive a restricted patent under said act.

BALLINGER, *Secretary*:

George Conway and Clare M. Cebell (as the Virginia Association), and J. Elmer Brooks, appeal from the decision of the Commissioner of the General Land Office, of date November 3, 1909, as modified by his decision of March 3, 1910, involving the S.  $\frac{1}{2}$  of Sec. 2, T. 12 N., R. 5 W., W. M., Vancouver land district, Washington.

The plat of survey of the township described was filed in the local office June 27, 1906, and on the same day Brooks made homestead

entry, No. 01376, of the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , Sec. 2, thereof.

August 23, 1906, Conway and Cebell (styling themselves the Virginia Association) filed coal declaratory statement No. 01377, for the entire S.  $\frac{1}{2}$  of said section, alleging—

that we came into possession of said tract by assignment about March 31st, 1906, from George Conway and Melvin W. Goodhue, forming the Virginia Association, who went into possession of said tract August 10th, 1901, and who have until the time of their assignment to us, and we have ever since, remained in actual possession continuously; and there has been expended in labor and improvements on said mine the sum of \$625.00, the labor and improvements being as follows:

Camps-----	10 days at \$5.00-----	\$50.00
Trail-----	20 " " 5.00-----	100.00
Exploration-----	30 " " 5.00-----	150.00
		<hr/> 300.00

Because of the conflict thus arising as to the N.  $\frac{1}{2}$  of the S.  $\frac{1}{2}$  of said section 2, a hearing was ordered by the local officers to determine the character of the land and the respective rights of the parties thereto. As a result of the hearing, which was had September 25, 1906, the local officers found the entire S.  $\frac{1}{2}$  of section 2 to be coal in character, but further found that the coal declarants had never opened and improved a mine of coal thereon, and hence had not, at date of filing of the declaratory statement, acquired a preference right to enter the same under the coal land laws, and therefore rejected the coal declaratory statement; and, for the reason that the land was shown to be coal in character, recommended that the homestead entry of Brooks be canceled. On appeal by Brooks, the Commissioner, by decision of November 13, 1909, concurred in the findings and conclusions of the local officers respecting the character of the land and the failure of the coal claimants to open and improve a mine of coal thereon. The action of the local officers with respect to the coal declaratory statement was, therefore, affirmed. The Commissioner further found, however, that the homestead claimant, having acted in entire good faith respecting his entry, was entitled to take a restricted patent to the land under the provisions of the act of March 3, 1909 (35 Stat., 844). The Commissioner, later, reconsidered the case, and, by decision of March 3, 1910, found and held as follows:

Upon further examination of the records in the office, it is found in the field notes of the survey of said township 12 N., range 5 E., that the surveyor who made same stated that a good quality of lignite coal has been found in several places in the north part of this township. Said survey was made during the year 1902.

In the case of *Clark vs. Schwiethale*, decided by the Department September 8, 1909 (unreported), where there had been a return noted on the township plat as coal land, prior to the filing of the homestead application, it was held

in substance, that the homestead claimant should not be allowed the right of election to take the surface, under the act of March 3, 1909, but that the entry must be canceled.

In view of the facts thus set forth, said decision of November 13, 1909, is hereby recalled and vacated to the extent that it allowed the claimant the right to elect to receive patent for the surface under the said act of March 3, 1909 (37 L. D., 112). The homestead application is hereby held for rejection.

The land, it appears, was, by departmental order of July 26, 1906, as modified by the order of December 17, 1906, withdrawn from disposition under the coal land laws, and by Executive order of July 7, 1910, said withdrawal was ratified, affirmed, and continued in full force and effect, and, subject to all the provisions, limitations, exceptions and conditions contained in the act of June 25, 1910 (36 Stat., 847), and the act of June 22, 1910 (36 Stat., 583), was withdrawn from settlement, location, sale or entry, and reserved for classification and appraisal with respect to the coal value thereof.

Upon examination of the record, the Department sees no reason to disturb the finding of the local officers, concurred in by the Commissioner, that the land embraced in Brooks's homestead entry is coal in character.

It appears from the record that while the coal claimants expended certain sums of money on the land embraced in their declaratory statement, in the construction of a trail to and across the land, built a log cabin thereon, and caused the land to be explored, a mine of coal had not been opened thereon at the time of the filing of the declaratory statement. The only purpose that a declaratory statement will serve is to preserve, for a certain period, a preference right of entry previously acquired by the entering into possession of a tract and the opening and improving of a mine of coal thereon. Without the latter, a coal declaratory statement is an absolute nullity. As was said in *McKibben v. Gable* (34 L. D., 178, 181):

The office of the declaratory statement is to preserve the right, not to create it. If the right does not exist, the declaratory statement has no office to perform and is without force or effect for any purpose.

The action of the local office and of the Commissioner, therefore, with respect to the declaratory statement here in question, was proper, and is hereby affirmed.

The Department finds itself unable, however, to concur in the Commissioner's action by the later decision with respect to Brooks's homestead entry. The act of March 3, 1909, *supra*, provides that—

Any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same.

The basis of the last mentioned action of the Commissioner would seem to be that the statement made by the surveyor in the field notes of the survey of said township is in effect a classification, claim or report of the land as being valuable for coal, and that inasmuch as it was made prior to the date of the entry, it defeats the right of the entryman to a restricted patent to the land under the act. The Department does not so construe said statement of the surveyor. It reads as follows: "A good quality of lignite coal is found in several places in the northern part of the township." This statement manifestly contains no reference whatever to the particular tract here in question, or to any other tract within the northern part of the township, and hence can not be regarded as a classification, claim or report of the coal character of any specific tract therein. In this respect the case differs very materially from that of *Clark v. Schwiethale*, cited by the Commissioner's decision, wherein it appeared that all of the land lying within certain lines delineated upon the plat, including that involved therein, was noted upon the plat as coal land. It is accordingly held that nothing in said statement of the surveyor can be taken as disentitling Brooks to a restricted patent, as provided for in the act, should he submit proof of due compliance with the requirements of the homestead law, and elect to receive such patent.

As thus modified, the decision of the Commissioner is affirmed, and the entry will remain intact, subject to compliance with the law.

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**RIGHT OF CONTEST—NOT ARBITRARILY DENIED—JUNIOR CONTESTANT—  
RIGHT TO INTERVENE.**

**FAIN v. STRUNK.**

*Decided November 8, 1910.*

The right to initiate a contest against an entry, given by the act of May 14, 1880, should not be arbitrarily denied.

A junior contestant alleging a sufficient ground of contest against the entry and also charging the fraudulent character of the senior contest, may, upon due notice to the respective parties, intervene in the proceedings on the senior contest, for the purpose both of sustaining his own charge against the entry and also his charge against the senior contest.

**BALLINGER, Secretary:**

This is an appeal by Logan Fain from decision of June 9, 1910, of the Commissioner of the General Land Office affirming the action of the local officers and dismissing his contest affidavit filed September 7, 1909, against the homestead entry made April 5, 1909, by Isaac N. Strunk for the NE.  $\frac{1}{4}$ , Sec. 35, T. 101 N., R. 78 W., 5th P. M., Gregory,

South Dakota, land district, for the assigned reason that said affidavit was filed for speculative purposes.

This affidavit is one of three filed against this entry at 9 A. M. on date stated, the others being by R. R. Johnson and F. L. Ink respectively and respectively docketed as Nos. 1023, 1024, and 1025, each alleging substantially the same grounds of contest, viz., that said entry was not made in good faith but for speculative purposes, in order to sell the relinquishment, and that the latter had been, in fact, sold by said Strunk.

Later on the same date one Walter L. Dishman filed contest affidavit No. 1029 against this entry, alleging the same grounds in substance and also collusion between Johnson and Ink in filing their contest affidavits.

On September 13, 1909, said Johnson filed a second contest affidavit No. 1033, realleging his former grounds and also alleging collusion between Fain, Ink and Dishman in filing their said affidavits, and on October 16, 1909, as stated, Johnson filed a third affidavit, charging abandonment against said entry.

On October 14, 1909, said Fain filed a second contest affidavit, as amendatory of his first, charging against said entry failure to establish residence, and on October 16, 1909, a third charging abandonment against same.

Office letter "H" of September 24, 1909, replying to the local officers' inquiry, advised that the affidavit first actually filed should be given precedence of adjudication, or if the one first filed is not known, the order on the docket should govern.

Accordingly, Fain's first and following affidavits were considered and on December 7, 1909, the local officers rejected same on the ground that he had been guilty of irregular practices and that these contests by him were speculative and collusive, and motion for reinstatement being denied, also motion, at a hearing ordered and had January 4, 1910, upon the second contest affidavit of said Johnson, to intervene on said hearing, Fain appealed to the Commissioner, who thereupon rendered the decision appealed from, including in same appeals filed also by said Dishman from the refusal of the local officers to allow him to intervene in said hearing, and from their subsequent rejection of his contest affidavit under office letter "H" of February 28, 1910, advising that:

this office would not be a party to the furtherance of any contest filed for speculative purposes, and for the safeguard of the public you should reject any contest affidavit wherein you were not satisfied of the bona fides of the contestant.

A special agent having investigated this case and rendered a report showing that said Fain and at least one if not two of his corroborat-

ing witnesses were his firm-partners and said Dishman and others named were connected with them in the business of professional contestants and locators, said office letter "H" directed the local officers also "to refuse to accept any contest affidavit made or corroborated by any of the parties named in the special agent's report."

It is held in the decision appealed from that:

The right of a contestant to proceed under the act of May 14, 1880, is not a vested one, although the charges might, if proven, defeat the entry. The right is subject to supervision and if abused the Department is clothed with ample authority to refuse to entertain any application to contest.

In this holding the Department cannot wholly concur. The right to initiate a contest upon a sufficient affidavit against an entry given by said act of May 14, 1880 (21 Stat., 140), should not be arbitrarily denied. Such action without opportunity for a hearing would be the denial of a right without due process of law. The debarment herein of Fain appears to have been wholly *ex parte* without any notice to him, and subsequent to the filing by him of his contest affidavits in this case. Such was contrary to the decisions of the Department in a number of cases, holding that the senior contestant has the right to seniority in adjudication, in which the junior contestant, prior to hearing, charging also the fraudulent character of the senior contest, may intervene, for the purpose both of sustaining his own charge against the entry and also his charge against the senior contest, if due notice of these charges shall have been given the respective parties. *James v. Stanley* (37 L. D., 560); *Regulations* (39 L. D., 217).

Fain was wrongfully debarred, therefore, of his senior right of contest. The decision appealed from is reversed and the case remanded for readjudication as to all parties in interest in accordance with the foregoing and with the regulations in force. However, in view of the report of the special agent purporting to show that the contestant is engaged in the practice of bringing speculative contests and reflecting upon the *bona fides* of the contest in this particular, it is directed that a special agent of the Land Office be present at the hearing in the interest of the Government to the end that the entry may be canceled if proper cause therefor be shown, notwithstanding any possible attempt to discontinue the contest proceedings upon the part of the contestant or contestants, and for the further purpose of taking proper action on any violation of the criminal laws, and reporting any improper practices which may be disclosed at the hearings.

APPLICATION FOR SURVEY—NOTICE—PREFERENCE RIGHT—NORTHERN  
PACIFIC SELECTION—ACT OF JULY 1, 1898.STATE OF IDAHO *v.* NORTHERN PACIFIC RY. CO.*Decided November, 9, 1910.*

No preference right of selection inures to the State by virtue of an application for survey of lands under the act of August 18, 1894, where the State fails to publish notice of the application as required by the act.

The provision in the act of March 3, 1893, according to the State of Idaho a preference right for a period of sixty days from the filing of the township plat of survey within which to select lands subject to entry by the State under the act of July 3, 1890, is not effective as against the United States and will not prevent the government including the lands in a national forest.

A valid selection by the Northern Pacific Railway Company under the act of July 1, 1898, subsisting at the date of the proclamation establishing the Coeur d'Alene national forest, excepts the land covered thereby from the operation of the proclamation.

BALLINGER, *Secretary*:

The Commissioner of the General Land Office, March 29, 1910, rejected the application of the State of Idaho, presented August 27, 1909, to make school land indemnity selection of Sec. 23, T. 42 N., R. 3 E., Lewiston land district, Idaho, and within the Coeur d'Alene (now Clearwater) National Forest, established by the President's proclamation November 6, 1906 (34 Stat., 3256), which contained the following reservation:

This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation or claim exists.

The decision appealed from was put upon two grounds:

1. It was found that the Northern Pacific Railway Company had a prior selection, under the act of July 1, 1898 (30 Stat., 597, 620), of part of said section, then unsurveyed, per list No. 42, proffered October 3, 1901, subsequently rejected, but reinstated and approved by the Commissioner of the General Land Office April 31, 1904, and rearranged by the company July 26, 1909, to conform to the public survey of the township, the plat of which had been filed July 1, 1909; that this "selection list of the company is in the form which has been approved and recognized by the Department for many years past, and the contention of the State that it is insufficient in form and substance is, therefore, without force; . . . that the pending selection of the railway company is such a 'prior valid claim' as excepted the land covered thereby from the operation of the Proclamation of November 6, 1906, establishing the Coeur d'Alene Forest Reserve;" and upon these findings it was inferentially, though not in terms, held that the company's right to the lands covered by its

selection was a prior and valid one, and to that extent defeated the claim of the State.

2. It was found that the State had admitted its inability to establish the fact that notice had been published by it of its application for a survey of the township under the act of August 18, 1894 (28 Stat., 394), and held that the State therefore secured no preference right by such application to select lands therein, and that its selection as to the whole of the section was defeated by the prior inclusion of the same in the Coeur d'Alene National Forest—citing *Heirs of Irwin v. State of Idaho et al.*, 38 L. D., 219.

As thus stated, the appeal of the State raises two material questions: (1) the alleged preference right of selection by the State under the act of August 18, 1894, *supra*, as to all the lands involved; and (2) the adjudged priority and superiority of the railway claim as to part of the lands involved.

In the case of *Heirs of Irwin v. State of Idaho et al.*, *supra*, at pages 221 and 222, it was said:

The act of 1894 merely gives the State a preference right of selection over all other applicants, and in thus inviting the State to apply for the survey of lands whereby a preference right over others may be secured, the government in no way commits itself or agrees to withhold the lands from any disposition which it may find necessary to make of the same. (See *Frisbie v. Whitney*, 9 Wall., 187; *Yosemite Valley case*, 15 Wall., 77; *Buxton v. Traver*, 130 U. S., 232.) The lands involved herein were included within the forest reserve prior to their survey, and of course before any attempt was made by the State to select the same. School indemnity selections are made subject to the approval of the Secretary of the Interior, and if, pending the State's application to select, the government under authority of law makes other disposition of the land, such disposition will defeat the State's claim. (See *State of Washington*, 36 L. D., 371, and cases cited.)

This decision was based, in part, upon an opinion of the Attorney-General of September 15, 1909 (see 38 L. D., 224). At page 229 of that opinion it was said:

I am therefore of the opinion that the State of Idaho in the case presented has no such preferential right of selection secured by the application of the governor under the act of 1894 as will interfere with the right of the United States to include these lands within the forest reserve established by the proclamation of the President of May 29, 1905, issued prior to the survey and selection of such lands and necessarily prior to any application by the State for specific tracts.

But further question being urged as to the correctness of this determination, the question was afterwards referred to the Attorney-General for his further opinion, and the matter is still under consideration by that officer. Said case can not, therefore, with propriety be now cited as controlling. If such determination continues to stand as the law on that question, it is conclusive of the main question raised by this appeal.



In that case, however, no question was raised as to publication of notice by the State, but the ruling therein made was upon a case wherein the State had presumably complied with the law as to notice, and where it would have been accorded a preference right of entry upon the lands reserved, from the date of its application for survey, but for the intervening Executive order including such lands within the interior limits of a national forest. It is therefore not believed that this case need await the further consideration of that question, for if, as now seems to be admitted, the State did not publish the notice of its application for survey of the township here in question, required by the act of 1894, there was no reservation made by that act, and none subsisting at the establishment of the Coeur d'Alene National Forest by virtue thereof; such reservation being expressly "with the condition that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, . . . giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State."

As bearing upon this same subject of reservation in the interest of the State, it is suggested, in the appeal, that the State is entitled to a preference right to select these lands by virtue of the provisions of the act of March 3, 1893 (27 Stat., 593). The suggestion is wholly without force. It is true that that act gives the State of Idaho a preference right for a period of sixty days from the filing of the township plat of survey to select lands subject to entry by said State which were granted to it by the act of July 3, 1890 (see *McFarland v. State of Idaho*, 32 L. D., 107, 108); but the land department rejects, as wholly untenable, the argument that said act creates a reservation against the United States, and prevents the appropriation of such lands to other uses by the United States. It is believed that in so far as the act of 1893 is important in determining the rights of the State in this matter, it created no reservation, and accorded no privilege, which precluded the establishment of the Coeur d'Alene National Forest. The adverse contention involves, in its last analysis, the consequence that the State of Idaho might acquire a preference right to select all unsurveyed lands within the State, and thereby prevent the operation of other laws upon all such lands.

As to the lands covered by the claim of the railway company, if a valid and subsisting claim at the date of the establishment of the said national forest, the lands embraced therein were excepted from the President's proclamation, and denial of the State's claim to these lands could technically rest upon the superiority of the railway claim, notwithstanding the fact that if the railway claim were eliminated the State's claim must still fail, because of the

national forest reservation. (See Southern Pacific Railroad Company, 32 L. D., 51.)

Considering the altogether unsatisfactory condition of this record, the Department declines at this time to render a final decision upon the claim of the railway company. The Commissioner of the General Land Office will more fully consider such claims, and report upon every essential feature thereof, if and when the lists are presented for the approval of the Secretary of the Interior.

A reference was made in the appeal in the nature of a protest against the action of the Commissioner of the General Land Office in considering, in connection with his decision, a concurrent resolution, No. 8, of the Legislature of the State of Idaho, approved March 4, 1909. In view of the conclusions of this decision, it is not conceived to be necessary to state, or consider, the objections to giving effect to such concurrent resolution.

The decision appealed from, in so far as it rejects the State's selection, is affirmed.

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**ENLARGED HOMESTEAD—ADDITIONAL—SECTION 3, ACT FEBRUARY 19, 1909.**

LILLIE E. STIRLING.

*Decided November 9, 1910.*

The widow of a deceased homestead entryman has the same right to enlarge the original entry of her deceased husband, by an additional entry under section 3 of the act of February 19, 1909, as he himself would have if living, provided she continues to maintain residence upon the original entry.

*BALLINGER, Secretary:*

October 5, 1906, George W. Stirling made homestead entry for the NW.  $\frac{1}{4}$ , Sec. 12, T. 14 N., R. 67 W., 6th P. M., Cheyenne, Wyoming, land district.

March 11, 1910, Lillie E. Stirling, widow of the above entryman, made homestead entry 05830 for the NE.  $\frac{1}{4}$  of said section as additional to the entry of her husband under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639).

By decision of June 29, 1910, the Commissioner of the General Land Office held the said latter entry for cancellation upon the ground that the right to make an additional entry under said section is the personal privilege of the original entryman, and that such right is not accorded to a widow, heir, or personal representative of the former entryman. From said decision an appeal brings the case before the Department for consideration.

While the particular question has never heretofore been considered by the Department, questions of a somewhat similar nature were considered in the cases of Annie Anderson (1 L. D., 24), and Pocahontas Martin (29 L. D., 185). The former case arose under the act of March 3, 1879 (20 Stat., 472); and it was held therein that a widow was entitled to make an additional entry as additional to an entry of eighty acres made by her husband prior to his death, and which she was in process of perfecting. In the latter case, which involved the construction of section five of the act of March 2, 1889 (25 Stat., 854), it was held that a widow was not entitled to make an entry additional to one made by her deceased husband prior to his death and which she perfected.

The Department is not prepared to say that these decisions are readily reconcilable; but from what is hereinafter stated it will be seen that the question now under consideration does not involve the soundness of either of the decisions cited, and for that reason they will not embarrass the Department in the determination of this case.

Section three of the act under consideration provides:

That any homestead entryman of lands of the character herein described upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

Congress having determined to permit the entry of 320 acres of this class of lands under the homestead law, the purpose of said section was merely to provide for the enlargement of existing entries to that area. In that respect it is remedial legislation and should be liberally construed to embrace the remedy.

Under the provisions of section 2291 of the Revised Statutes, the widow is the statutory successor of her deceased husband and as such is entitled to perfect an original entry made by him and take patent in her name and right as his widow. She is the holder of the entry, engaged in the process of completing title to the same, and in that sense she may be said to be an entryman within the meaning of the third section of the act under consideration.

It is true the widow is not required to reside upon the land embraced in an original entry made by her husband in order to perfect title thereto. Neither is her homestead right exhausted by completing such entry and receiving title. It is assumed in the present instance that the widow is residing upon the original entry; otherwise, it would be of little or no advantage to her to make the entry under consideration as an additional entry. The chief advantage gained by making additional entry is that it permits the entryman to perfect title by residence upon and cultivation of the

original entry. No good reason is seen why a widow should not be accorded this privilege where she is residing upon the unperfected entry originally made by her husband, where, it is to be presumed, she did reside with her husband prior to his death, and where she has a house with the necessary accessories for homemaking. It does not meet the situation fully to say that the widow may make original entry in her own right and that it is therefore unnecessary for her to resort to the expedient of making an additional entry as the widow of her deceased husband. If she has a proper home upon the original entry, there are many reasons why she should not be required to abandon the same and remove to other land. Under section 2291 of the Revised Statutes, she is accorded the right to perfect title to the original entry in her own name, and the Department is of the opinion that section three of the act under consideration confers upon her the same right to enlarge the original entry which her husband might have exercised had he been living.

This is believed to be in accord with the purpose of Congress in providing for enlarged homestead entries of lands of this character, and it follows that the decision of the General Land Office must be reversed.

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APPLICATION—ADVERSE SETTLEMENT—RESIDENCE.

POUNDER *v.* ALLEN.

*Decided November 10, 1910.*

One asserting prior settlement as against an application to enter, suspended because of the closing of the local office, must, in order to maintain his alleged claim, continue residence upon the land pending determination of the question of superior right.

BALLINGER, *Secretary*:

Charles F. Allen has appealed from the decision of the Commissioner of the General Land Office dated June 13, 1910, which reverses the action of the register and receiver and holds for cancellation his homestead entry made November 20, 1906, for the SW.  $\frac{1}{4}$ , Sec. 26, T. 11 N., R. 21 E., North Yakima, Washington, and allowing John A. Ponder to make desert land entry for said tract together with the quarter section adjoining thereto on the east.

The salient facts as disclosed by the record are as follows: The township in which the land is located was open to entry November 15, 1906. At 9 o'clock A. M. of that day John A. Ponder applied to make desert land entry for the S.  $\frac{1}{2}$  of said section 26.

November 20, 1906, Charles F. Allen, appellant herein, applied to make homestead entry for the SW.  $\frac{1}{4}$  of said section, claiming that he made settlement thereon in the early morning of November 15, 1906, by hauling a load of timber on the land.

The local office being closed for business on account of the death of the receiver, both of said applications were held without action.

February 23, 1907, the local office was opened for business and on the 28th day of that month Pounder's application was rejected and that of Allen was allowed, his entry being placed of record on that date.

From that action Pounder appealed. December 9, 1907, action was taken on the appeal and hearing was ordered. At the hearing the entryman defaulted, testimony was taken resulting in favor of Pounder. On appeal, the Department remanded the case for further hearing to enable Allen to show, if he could, that he was a *bona fide* settler on the land at the moment Pounder presented his application.

Said hearing was duly had. The register and receiver found in favor of Allen. On appeal, the Commissioner of the General Land Office reversed that action, with results noted.

The record has been carefully examined. The testimony is difficult of reconciliation. The main issue tried was whether Allen had placed a load of lumber on the land on the morning of November 15, 1906, and thus made *bona fide* settlement before Pounder filed his desert land application.

Three or more witnesses visited the land after November 15th, for the very purpose of ascertaining whether the alleged lumber was then on the land. These witnesses testified that they made a very careful examination going over all parts of the land and that no lumber was there.

Allen and a man he had hired testified that one thousand feet of lumber was purchased at a mill situated about four miles from the land, at about seven o'clock on the morning of the 15th; that the lumber was hauled to the land—one half being placed on the land in question and the other half on an adjoining quarter section for the use of another intending settler. These witnesses were positive that five hundred feet of the lumber was placed on the land.

Another witness, living near the land and called by Allen, testified that the lumber was in fact hauled on the morning stated, but that it was not placed on the land but was placed on an adjoining tract just over the line. He was positive as to this statement being well acquainted with the location of the boundaries.

The Department is unable to find error in the decision appealed from to the effect that the lumber was not placed on the land as claimed by appellant.

Whatever the real facts with reference to Allen's alleged prior settlement may be, one thing clearly appears. Allen was in default in that he failed to timely continue his alleged acts of settlement and he did not establish residence on the land until about nine months after entry.

Allen's entry was in the first place erroneously allowed because of Pounder's prior application. Allen's right, if any, depended upon proof of his alleged prior act of settlement, and before either application could have been properly allowed a hearing was necessary. This hearing was afterwards properly ordered. Allen's right was therefore at all times based upon his alleged prior settlement and not on his erroneously allowed entry.

He knew from the first, or should have known, that Pounder's prior application defeated his right to entry unless he could establish his right by showing prior *bona fide* settlement. His claim was, therefore, based on settlement, and in the presence of Pounder's active continuous assertion of right to the land, of which Allen had full knowledge, the latter should have in good faith continued his acts of settlement and improvement and should have established his residence at an earlier date and otherwise shown good faith by his acts.

This he did not do. If he placed the lumber on the land at the time stated, and that is doubtful, he did nothing else for some seven months. His right being dependent upon his alleged initial act of prior settlement he lost that right by his laches.

One who proceeds against an entry of record alleging prior settlement must continue to reside on the land during the pendency of the proceedings, else he will lose the right claimed. *Mary E. Coffin* (34 L. D., 298) and cases there cited; *Shaw v. Russell* (38 L. D., 275).

The same principle applies when an alleged prior settler seeks to enter land for which there is an existing prior application suspended by reason of closing of local office.

In the brief filed out of time, October 31, 1910, it is stated that Pounder failed to deposit the fees, commissions and initial payment when he filed his application November 15, 1906, to make desert entry. It is therefore contended that Pounder never had any standing as an applicant.

It is possible that the land office records may not disclose the fact that such fees, etc., were or were not, deposited or tendered. Pounder's application has at all times up to filing the late brief been treated as a legal and sufficient application. In the papers it is observed that Pounder called attention to the fact that he filed with his application the fees, commissions, etc., and that assertion has never been brought in question until very recently—at least a search of the papers fails to disclose any such denial until recently made.

When the case was previously before the Department no such question was raised and it is too late now.

If Pounder ever secures the entry he seeks it will only be after he has made full payment of all required costs.

The decision appealed from is affirmed.

## RECLAMATION WATER RIGHT—RATE—IRRIGABLE AREA.

WALTER L. MINOR.

*Decided November 15, 1910.*

Where after application for water right for the irrigable area of a farm unit, under the terms and for the acreage fixed in the published notice, a second notice is given, showing an increased irrigable area in the farm unit and fixing a different rate per acre, the applicant is entitled to complete payment for the area originally fixed at the rate specified in the first notice, but as to water right for the additional irrigable acreage shown by the second notice, he will be required to pay at the rate fixed in the latter notice.

PIERCE, *First Assistant Secretary*:

The farm unit plats accompanying the public notice of July 29, 1907, North Platte Reclamation Project, Nebraska, showed 80 acres of irrigable land in Farm Unit "B" of sections 15 and 22, T. 24 N., R. 57 W., 6th P. M., and the entryman, Walter L. Minor, filed water right application therefor under the provisions of the said public notice, which provided for the payment of the building charges of \$35 per acre of irrigable land in not exceeding ten annual instalments of not less than \$3.50 per acre each.

It subsequently became necessary, due largely to changes in the final location of the lateral ditches and to the difficulty of accurate determination of irrigable areas in the early development of the project, to correct the farm unit plats with respect to the irrigable areas shown thereon, it having been ascertained that in some cases the irrigable areas were not so great as delineated upon the plats and in other cases it was found that an increased area could be irrigated. Accordingly, revised farm unit plats showing the correct irrigable acreages were approved by the Department on May 7, 1910, and public notice dated June 6, 1910, was issued in pursuance thereof, the revised plats and the said public notice including the lands in T. 24 N., R. 57 W.

The public notice of June 6, 1910, fixed the charges per acre of irrigable land at \$45 per acre with no operation and maintenance charges for two years and permitted entrymen who had made water right applications under the public notice of July 29, 1907, to amend their applications so as to conform to the later public notice if they so desired. Mr. Minor did not elect to amend his original application and same remains subject to the terms and conditions of the public notice of July 29, 1907. However, the revised farm unit plat, approved May 7, 1910, shows an additional irrigable area of four acres within farm unit "B", or a total of 84 irrigable acres.

September 3, 1910, Minor presented an application for water right for the four acres of irrigable land in question at the rate per acre

fixed by the public notice of July 29, 1907, \$35 per acre. The project engineer rejected the application on the ground that application for the water right for the four acres added to the irrigable area by the amended plat must be made in pursuance of the public notice of June 6, 1910. Entryman has appealed from the said decision, alleging that he was, at time of his original application for a water right, willing to make application for the entire irrigable acreage and that it was through the fault of the Department in not having ascertained the correct irrigable acreage, that he failed to apply for a water right for 84 acres instead of 80 acres, that consequently he is entitled to water for the four acres in question at the rate of \$35 per acre.

Section 4 of the Reclamation Act authorizes the Secretary of the Interior to fix by public notice the lands irrigable under reclamation projects and the charges which shall be made per acre upon such entries. In this case he fixed the irrigable acreage of Minor's entry at 80 acres and Minor having duly applied thereunder, was entitled to water at the rate fixed in said public notice. This action did not preclude the Secretary of the Interior, upon subsequent investigation, because of change in position of the laterals or for other reasons, from revising the farm unit plats so as to include additional areas made, or ascertained to be, irrigable, under the system. As to such added areas, he had the right under the law to impose such equitable charges and conditions as were imposed upon other lands for which water right applications had not been made under the previous public notice of July 29, 1907. The revision of the farm unit plats so as to show an additional irrigable acreage in Minor's entry did not deprive him of the right to perfect his water right application for the 80 acres included in his original application, but it properly applied to the added area the additional burdens and conditions imposed upon other lands for which water right applications had not theretofore been filed. The four acres not covered by his original water right application occupied an entirely separate and distinct status from the lands depicted as irrigable upon the original plat, and entryman gained no right or equity in or to water for this area by his application for water for the 80 acres described in the plat approved in 1907.

It is accordingly held that the four acres in question added to the irrigable acreage of farm unit "B" embraced in the entry of Walter L. Minor are subject to the provisions, conditions and limitations of the public notice of June 6, 1910. The action of the project engineer is accordingly affirmed. Advise entryman hereof and that he will be required to file an application and to make the payments required by said public notice of June 6, 1910, before water will be furnished for the four acres hereinbefore described.



**MINING CLAIM—ADVERSE—AMENDMENT OF PLAT AND FIELD NOTES TO SHOW EXCLUSION.****LAWRENCE DONLAN.***Decided November 17, 1910.*

Where as result of an adverse proceeding a portion of a conflict area is excluded in favor of the adverse claimant, proper amendment should be made and certified by the surveyor-general upon the official plat and in the field notes of survey of the claim, made necessary by the judgment, so that the boundaries and areas of both that portion of the claim entered and that so excluded shall be definitely shown and described.

*PIERCE, First Assistant Secretary:*

Lawrence Donlan, who, on December 20, 1909, made mineral entry, No. 03451, for the Walkerville lode mining claim, survey No. 8657, Helena, Montana, land district, has appealed from the decision of the Commissioner of the General Land Office, dated June 28, 1910, requiring the entryman to furnish an official plat, together with an approved copy of the field notes of the survey, amended, or to appeal, on pain of the cancellation of the entry.

January 8, 1908, Lawrence Donlan filed application, No. 01175, for said Walkerville claim and the Black Jack lode mining claim, survey No. 8658, accompanied by the usual papers, including the official plat and certified transcript of field notes of said surveys, together with a certificate of the requisite \$500 expenditure. The two claims above named are located longitudinally in an east and west direction, the Walkerville lying to the west of and adjoining the Black Jack claim.

Among other conflicts shown was that of the Marie lode claim, survey No. 6789, with the western portion of the Walkerville location, the conflict area covering 1.755 acres, according to the field notes. The claimant for the Marie lode seasonably filed an adverse claim (serial No. 03456), and instituted suit. During the pendency of that action, and on December 10, 1908, applicant Donlan applied to purchase and made entry for the Black Jack claim. This entry was approved and passed to patent in 1910.

Judgment in the adverse suit was rendered June 16, 1909, and awarded to the applicant (defendant in that action) the major portion of the conflict area, namely, a tract described by metes and bounds referred to the official surveys of the claims, embracing an area of 1.589 acres, more or less, and also awarded to the adverse claimant a small portion of the northerly part of the conflict involved, which tract included an area of .161 of an acre, more or less, specifically described by metes and bounds. The sum of these areas is 1.750 acres, more or less, which is .005 of an acre less than the area of the Marie conflict (1.755 acres) shown in the official field notes.

The total area of the Walkerville claim set forth in the official survey and as alleged in the applicant's answer in the adverse suit, is 15.651 acres, and that area, less the portion of the conflict awarded to the Marie claimant (.161 of an acre), leaves 15.490 acres as the clear area of the Walkerville location.

December 2, 1909, Donlan filed in the local office a certified copy of the judgment roll in the adverse suit, and applied to purchase all the Walkerville area except the small portion awarded to the adverse claimant by the judgment, which was excluded and specifically described by metes and bounds. The claimed area recited in his application to purchase is the same as that recited in the judgment, namely, 14.49 acres. Upon filing of waiver of right of appeal from the judgment, the local officers on December 20, 1909, allowed entry for the Walkerville lode (serial No. 03451), with the stated area of 14.49 acres.

As may be observed, there is an apparent discrepancy in two particulars with regard to areas.

The decision appealed from states that Donlan made the entry "under a judgment roll" for a portion of the Walkerville claim, and continues as follows:

Section 2326 U. S. Revised Statutes, which provides for entry upon a judgment roll, requires that there be filed therewith the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made upon such claim, and the description required in other cases, in addition to payment of all proper fees.

In the present entry, no plat or field notes of the survey have been filed with the papers in the case. Claimant will accordingly be required to furnish an official plat, showing thereon the discovery, improvements and the tract awarded by said judgment, together with an approved copy of the field notes of the survey, amended to describe the tract awarded under the judgment by metes and bounds and the acreage thereof, and the improvements existing upon the claim. See case of A. Y. Lode (2 L. D., 706).

From this holding the entryman has appealed, contending that the official plat and field notes already filed by him, taken in connection with the descriptions contained in the certified copy of the judgment roll, furnish ample data for issuing patent on his entry.

Section 2326 of the Revised Statutes is in part as follows:

After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court,

to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights.

The term "description required in other cases" evidently refers to the—

certificate of the United States surveyor-general . . . that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent.

Paragraph 85 of the mining regulations is as follows:

Where an adverse claim has been filed and suit thereon commenced within the statutory period and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll, together with the other evidence required by section 2326, Revised Statutes.

Obviously it is necessary, not only for the benefit of his own office records, but for the guidance of the Commissioner in the preparation of the patent to be issued for the Walkerville lode, that proper amendments be made and certified by the surveyor-general upon the official plat and in the field notes of the survey of the claim, made necessary by the judgment, so that the boundaries and areas of both that portion of the Walkerville claim entered and that portion excluded in favor of the adverse Marie claimant shall be definitely shown and described.

The official plat of the Walkerville claim, together with field notes and certificate as to improvements, was furnished and filed with the application (No. 01175) for the two claims applied for by Donlan and is still a part of that application record. The contents of those papers, so far as pertinent and sufficient, will be considered and utilized, and the burden of duplicating the showing already made thereby will not be imposed upon the entryman.

No field work is necessary in order to make the requisite amendments. The official plat and field notes now on file, together with the judgment roll and such other papers as may be requisite should, upon request therefor by the entryman, be returned to the office of the surveyor-general, accompanied by such special instructions as may be required in the premises, in order that proper amendment may be made on the face of the plat, and that additional amendatory sheets may be added to the field notes and certified by the surveyor-general, agreeable to the usual practice of the General Land Office

in the making of amended surveys, which requires only office work.

The Commissioner's decision is accordingly modified to conform to the views above set forth. and the case is remanded for further appropriate action.

#### LODE WITHIN PATENTED TOWNSITE.

##### MILL SIDE LODE.

*Decided November 19, 1910.*

In order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain mineral, when the townsite patent takes effect, but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them.

Title based upon a patent, presumptively complete, issued on a townsite entry, and remaining unchallenged for many years, should not be disturbed, in favor of a lode mining applicant, except upon the clearest proof that the conflicting area was known, at the date of the patented entry, to occupy such a status, or possess such a character, that complete title thereto can not be held to have passed thereunder.

No patent should be issued or entry allowed for any lode within the exterior limits of a patented townsite in the absence of a determination, as the result of a hearing had in a proceeding to which those claiming under the townsite patent are parties, that such lode was known to exist at the time of the filing of the townsite application.

*PIERCE, First Assistant Secretary:*

This case comes before the Department on the appeal of the Idaho Consolidated Mines Company, Limited, from the decision of the Commissioner of the General Land Office of date June 6, 1910, requiring a further showing to support its mineral entry, serial No. 0662, for the Mill Side lode mining claim, survey No. 2336, situate in the Hailey land district, Idaho.

The application upon which the entry was allowed was filed February 27, 1908, and was based upon a location made December 10, 1900, which, in turn, was predicated upon a discovery alleged to have been made on the first day of that month. The claim lies wholly within the limits of the townsite of Broadford, which was entered under the provisions of section 2387, Revised Statutes, May 23, 1884, and patented December 5 of the same year, the patent containing the clause—

That no title shall hereby be acquired to any mine of gold, silver, cinnabar or copper or to any valid mining claim or possession held under existing laws.

Inasmuch as the land had been thus patented, the company sought to support its application by a number of affidavits of persons who

claimed to have known the land at the date of the townsite entry, and who aver, in general terms, that prior thereto the ground embraced in the lode claim above named was, and ever since has been, held under valid mining locations; that at the date of the townsite entry the said ground was generally known by the residents of the town of Broadford to be mineral in character; that the mining claim in question adjoins and conflicts with the Queen of the Hills lode mining claim (part of which lies within the limits of the townsite), which has produced more than \$1,000,000; that the Minnie Moore mine, owned by the entry company, which has produced upwards of \$7,000,000, is situated within a mile and a half of the claim in question; that in the present workings of the claim is disclosed a well-defined vein or lode carrying lead, silver and iron ores, and that the showing therein is sufficient to justify the expenditure of money in the development of the same; that the town of Broadford is a very small village, containing not to exceed 75 inhabitants (men, women and children), and is unincorporated; that the entry company has expended the sum of \$90,000 in the erection of a mill upon said claim for the purpose of reducing ores therefrom as well as from the Minnie Moore, Queen of the Hills, and other mines owned by the company.

In the decision under consideration, the Commissioner found that the affidavits filed failed to show that the ground embraced in the mineral entry was known at the date of the townsite entry to be valuable for minerals; that minerals were then known to exist in the land in such quantity as to justify any systematic or continuous work upon the land for the purpose of extracting them, or that the land was then embraced in any valid mining claim or possession under the then existing laws. It therefore held the showing to be insufficient, in the face of the existing townsite patent, to warrant the issuance of a mineral patent to the land in question, but allowed the mineral claimant sixty days within which to apply for a hearing, notice thereof to be given by publication, under Rule 13, Rules of Practice, and served upon the townsite authorities, for the purpose of determining:

1. Whether said land was known at the date of the townsite entry to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them.
2. Whether at said date said land or any portion thereof was held as a mining claim, which possession was recognized by local authority; and
3. Whether said land or any portion thereof was a valid mining claim or possession held under existing law at the date of the townsite entry.

It is insisted by appellant that the showing made is sufficient to warrant a finding that the particular area here in question was, at

the date of the townsite entry, embraced in valid mining locations, and was then known to be mineral land; and hence that it was error not to hold, on the present showing, that by the express terms of the townsite patent it was excepted therefrom, and was accordingly subject to patent under the mineral entry. The Department is unable to so regard the showing. In the first place, no facts, as distinguished from mere conclusions, are presented from which it can be determined what, if any, value the land possessed at the date of the townsite entry or patent, or what, if any, portion thereof was embraced in a mining location, valid or otherwise. Conceding, however, that the land was known at the date of the townsite entry to contain some mineral, that fact alone would not warrant a conclusion that it was excepted from the townsite patent; for the Supreme Court, in the case of *Dower v. Richards* (151 U. S., 658, 663), held that—

In order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, when the townsite patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them—

and the Department itself has, in a number of cases recently decided, expressed its unwillingness to disturb, in favor of the lode mining applicants, titles based upon patents, presumptively complete, issued on townsite or placer entries where such patents, as appears to be the case here, had remained for many years unchallenged, except on the clearest proof that the conflicting area was known, at the date of the patented entry, to occupy such a status, or possess such a character, that complete title thereto could not be held to have passed thereunder. The showing herein presented does not, in substance, fulfill these requirements.

Moreover, it is in effect held by the Supreme Court, in *Iron Silver Mining Company v. Campbell* (135 U. S., 286), that no patent should be issued or entry allowed for any lode within the exterior limits of a patented placer in the absence of a determination, as the result of a hearing had in a proceeding to which the placer patentee, or his successor, was a party, that such lode was known to exist at the time of the filing of the placer application. That principle applies with equal force with respect to a lode claimed to exist within the limits of a patented townsite, and has been, in fact, repeatedly so applied by the Department. The showing relied upon herein being purely *ex parte* would, therefore, be insufficient, even if otherwise unobjectionable.

The decision appealed from is accordingly affirmed.

## TIMBER AND STONE ENTRY—CHARACTER OF LAND.

ALBERT R. PFAU, JR.

*Decided November 19, 1910.*

The character of land embraced in a timber and stone entry is judicable by smallest legal subdivisions; and where at any time prior to patent, notwithstanding payment may have been made and accepted and certificate issued for the entire tract applied for, a legal subdivision is found to be not of a character subject to disposition under that act, the certificate should be to that extent canceled.

PIERCE, *First Assistant Secretary*:

Appeal is filed by Albert R. Pfau, Jr., from decision of July 6, 1910, of the Commissioner of the General Land Office rejecting that part of his purchase under the acts of June 3, 1878 (20 Stat., 89), and August 4, 1892 (27 Stat., 348), made under his sworn statement filed January 11, 1909, and certificate issued January 26, 1910, for the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 32, T. 67 N., R. 17 W., 4 P. M., Duluth, Minnesota, land district, which relates to the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of said section, for the assigned reason that said rejected land is chiefly valuable not for timber but for agriculture.

The facts in this case are fully set forth in said decision and need not be recapitulated.

The appeal does not dispute the character of the land in question as held in said decision, but contends that no authority of law exists for thus dividing an entry of this kind and rejecting a part thereof, for the reason stated, after proof has been made and accepted and the appraised value paid for the entire entry.

Reference is made in argument to the several provisions of the timber and stone laws and of the regulations of November 30, 1908 (37 L. D., 289), made thereunder, which govern this case, wherein the lands applied for under said laws are spoken of in terms of the singular number, as an entirety, and not as several tracts according to the surveyed subdivisions; and it is argued that this fact shows the indivisibility in law of a claim, under the timber and stone acts, as made by a claimant.

Section 1 of the original act of June 3, 1878, *supra*, provides that the lands subject to disposition thereunder are the "surveyed public lands . . . valuable chiefly for timber, but unfit for cultivation," and such are salable "in quantities not exceeding 160 acres;" and the succeeding sections of that act provide as to the manner of claiming and of adjudicating claims under such substantive right to such lands created by said section 1 of the law, and prescribe that the particular tract of land desired to be purchased shall be described, in such claim, and in the published notice thereof, "by legal subdivisions," concluding with the proviso that "effect shall be given to the foregoing

provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

Said regulations of November 30, 1908, *supra*, prescribe that:

Any lands subject to sale under the foregoing acts may, under the direction of the Commissioner of the General Land Office, upon application or otherwise, be appraised by smallest legal subdivisions at their reasonable value but at not less than \$2.50 per acre; and hereafter no sales shall be made under said acts except as provided in these regulations.

All unreserved, unappropriated, non-mineral, surveyed public lands within the public land states, which are valuable chiefly for the timber or stone thereon and unfit for cultivation at the date of sale, may be sold under this act at their appraised value, but in no case at less than \$2.50 per acre, in contiguous legal subdivisions.

It was the undoubted intent of the law that only lands of the character specified should be salable or sold thereunder, that the same should be judicable and salable by legal subdivisions, and that the Commissioner of the General Land Office should regulate such adjudications and sales accordingly.

The general language used with reference to claiming and adjudicating claims under the law can not control the construction of section 1 thereof creating the substantive right and title to the land and plainly showing that only those lands, of the character specified, contained in the subdivisions of quarter-sections are subject to disposition under this law.

The power of the Commissioner to make the regulations in question is clear, and is given by express provision of the law. Francis Gormley (20 L. D., 450).

And the fact that payment for the entire tract claimed was made and accepted and certificate issued by the local officers does not preclude the Commissioner or the head of the Department, prior to patent, from investigating the legality of such entry and cancelling such certificate, in whole or in part, so as to conform the entry to the law; for such is the province of the Commissioner and of the Secretary with reference to the public land business.

The decision appealed from is affirmed.

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#### COMMUTATION—RESIDENCE—LEAVE OF ABSENCE.

SHERMAN SHOUSE.

*Decided November 21, 1910.*

Two periods of *bona fide* residence, separated by a leave of absence regularly procured, without fraud, may be added together to make up the necessary fourteen months as a basis for commutation.

Esberne K. Muller, 39 L. D., 72, modified.

PIERCE, *First Assistant Secretary*:

Upon informal request, the above-entitled case has been certified to the Department for consideration. The record shows that Sher-



man Shouse made homestead entry, No. 07697, August 10, 1906, for the NE.  $\frac{1}{4}$ , Sec. 29, T. 10 N., R. 9 E., Santa Fe, New Mexico, land district. He submitted commutation proof March 18, 1910, and certificate issued thereon March 25, 1910.

The proof shows that the entryman established his residence on the land February 10, 1907, and that he had not been absent therefrom except under a leave of absence, which authorized him to be absent from August 25, 1909, to February 25, 1910. It appears, however, that he did not take the full period of time, but returned to his claim January 29, 1910. Eighteen acres were cultivated in 1907, 30 acres in 1908, and 40 acres in 1909. The value of the improvements is placed at \$500. In his final proof entryman states that his crop for 1909 was a failure. The final proof witnesses make the same statement. Crop failure was made the basis for his application for leave of absence.

Under authority of departmental decision in the case of Esberne K. Muller (39 L. D., 72), the Commissioner by decision of October 28, 1910, rejected the commutation proof submitted by Shouse, holding that the absence of the entryman for five months and four days within the period of fourteen months just prior to the submission of proof broke the continuity of his residence under the principle announced in the above-mentioned decision.

In the said case of Muller, it was stated, *inter alia*, that (syllabus):

Commutation is allowed only upon a showing of substantially continuous personal presence upon the land for a period of fourteen months next preceding submission of proof; and residence prior to a period of absence under leave of absence granted the entryman can not be added to residence subsequent to that period to make up the necessary fourteen months.

The holding above stated was unnecessary to the conclusion reached in that case, as the proof was properly subject to rejection for other reasons appearing therein. The local officers found from the testimony in that case that the entryman never had established a *bona fide* residence on the land, and that his alleged occupancy of same consisted merely of occasional visits thereto. The Department stated that the finding of the local officers was justified by the record.

A leave of absence granted under the act of March 2, 1889 (25 Stat., 854), if not fraudulently procured, protects an entryman for the period granted from contest on the ground of abandonment. He can not receive credit as for residence for the period he is absent under such leave, but it can not properly be held, either as to ordinary five-year proof or commutation proof, that by procuring such leave he forfeits a period of *bona fide* residence for which he has earned credit prior to the beginning of such leave of absence. The period of absence during the time authorized should simply be eliminated from calculation when considering the period of residence to

which an entryman is entitled to credit. Thus, two periods of *bona fide* residence, separated by a leave of absence regularly procured, may be added together and made the basis for commutation proof.

The decision in the case of Muller, *supra*, is hereby modified to meet the views herein expressed, and it is directed that the Commissioner's decision in the case under consideration be recalled and vacated and the entry passed to patent unless other objection appear.

#### DECEASED HOMESTEADER—WILL—HEIRS.

##### KNIGHT *v.* HEIRS OF KNIGHT.

*Decided November 21, 1910.*

A will, in so far as it attempts to pass any interest in a homestead entry before the completion of title by compliance with the homestead law, is inoperative as against those upon whom the law devolves the right to the entry; and no possession under such a will can be pleaded in excuse of failure to comply with the law by those upon whom the law devolves the right to the entry.

PIERCE, *First Assistant Secretary*:

Ada Knight has appealed from the decision of the Commissioner of the General Land Office of June 22, 1910, affirming the action of the local officers dismissing her contest against the heirs of Susan Knight, deceased, who made homestead entry 19243 on August 23, 1907, for the SW.  $\frac{1}{4}$ , Sec. 9, T. 2 N., R. 35 E., Roswell, New Mexico.

Contestant is the "grand-daughter-in-law" of the entryman, Knight, but not an heir.

The contest affidavit, sworn to before a United States commissioner, August 2, 1909, alleges that the heirs, all of whom were named, had wholly abandoned the land, that none of them had resided upon or cultivated the land, or kept up the improvements. Service was had by publication.

The deceased entrywoman had resided on the land for nine months, and up to the time of her death (which occurred on May 6, 1908) contestant and her husband resided with her during this period and have remained on the land ever since, the improvements, consisting of a three-room dwelling house, stock barn, well, and eighty acres of cultivation enclosed in a three-wire fence, having been made by the latter.

The only efforts upon the part of the heirs of the decedent to acquire possession of the land in controversy consist in a request made by one Carter, who represented himself to be their attorney, in April, 1909, for possession of the land and crops, and another request, made in September, 1909, after the commencement of the contest proceed-

ing, by one Grogan, on behalf of the heirs, neither of which was granted.

The Commissioner excuses any more energetic attempt upon the part of the heirs to acquire possession, reside upon, or cultivate the land, upon the ground that the entrywoman having, by nuncupative will, specifically devised the land to contestant, the possession of the latter was pursuant thereto, and an entry in the face thereof would have constituted trespass. This conclusion is incorrect. A will, in so far as it attempts to pass any interest in a homestead entry before the completion of title by compliance with the homestead law, is inoperative as against those upon whom the law devolves the right to the entry, and no possession under such a will can be pleaded in excuse of failure to comply with the law by those upon whom the law devolves the right to the entry. *Chapman v. Price* (32 Kansas, 446; 4 Pac., 807); *Lewis v. Lichty* (3 Wash., 43; 28 Pac., 356). Were it otherwise, the will would terminate all right in the heirs and the devisee might relinquish the entry to the end that another might perfect title, or perfect title in his own right, if qualified. Whatever the rights of the heirs of a deceased homesteader prior to the completion of title, by compliance with the provisions of the homestead law, the facts in this case show that such rights were not protected by continued compliance with law following the death of the entrywoman, and in either view of the case the heirs can not justly complain of the cancellation of the entry.

The decision appealed from is accordingly reversed and the entry will be canceled.

This decision is in lieu of departmental decision in this case rendered October 25, 1910, which has not been promulgated and which is hereby recalled and vacated.

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**HOMESTEAD ENTRY—MARRIED WOMAN—SETTLEMENT—ACT JUNE 6, 1900.**

MARGARET J. DINGMAN.

*Decided November 21, 1910.*

A single woman who applies to make homestead entry through an officer authorized to take the preliminary affidavit, and marries prior to receipt of the application at the local office, is not qualified to make the entry.

Mere acts of settlement, without residence, performed by a single woman who subsequently marries prior to the allowance of entry upon her application for the land, do not bring her within the provisions of the act of June 6, 1900, and she is not entitled to carry the entry to completion.

PIERCE, *First Assistant Secretary*:

Margaret J. Dingman, now Bailey, has filed a motion for review of departmental decision of June 30, 1910 (not reported), and for

a rehearing. Said decision affirmed the decision of the Commissioner of the General Land Office of January 24, 1910, sustaining the action of the local officers and holding for cancellation her homestead entry made September 18, 1901, for the SE.  $\frac{1}{4}$ , Sec. 32, T. 39 S., R. 4 E., Roseburg, Oregon, land district.

The entrywoman submitted final proof April 12, 1907, which was suspended pending investigation. September 15, 1908, the Commissioner directed proceedings against the entry based upon an adverse report theretofore made by a special agent of his office. It was charged that the entrywoman never established and maintained residence on the land, and that the entry was not made in good faith for a home but for the purpose of speculation. A hearing was duly had on the charges, resulting in the action above stated.

It was disclosed by the evidence that the entrywoman executed her application papers before an officer other than the register or receiver in the forenoon of September 17, 1901, and that she was married in the afternoon of the same day to George W. Bailey. The application papers were transmitted to the local land office and it appears they reached there on September 18, and the entry was allowed as of that date. The proof was rejected and the entry held for cancellation because the entrywoman was not qualified to make entry as she was a married woman at that date, and for the further reason that she did not maintain *bona fide* residence on the land thereafter.

It was held in the case of Jennie Routh (13 L. D., 601), that (syllabus):

A single woman who applies to make homestead entry through an officer authorized to take the preliminary affidavit therein, and then marries prior to the time when such application is received at the local office is not qualified to make said entry.

Affidavits have been submitted in support of the motion for review, and a rehearing is requested on the ground of newly-discovered evidence. This so-called newly-discovered evidence consists of statements of claimant duly corroborated by her husband and others to the effect that she had in fact performed acts of settlement on the land prior to her marriage. The claimant's attorney states as an excuse for not having heretofore presented this evidence, that the claimant is ignorant and did not convey this information to him and did not understand its importance. It is assumed that it was intended by the showing now offered to bring the claimant within the provisions of the act of June 6, 1900 (31 Stat., 683). Said act reads in part as follows:

Where an unmarried woman, who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established, and maintained a *bona fide* residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall hereafter marry,

before making entry of said land, or before making application to enter said land, she shall not, on account of her marriage, forfeit her right to make entry and receive patent for the land: *Provided*, That she does not abandon her residence on said land, and is otherwise qualified to make homestead entry.

It is not claimed in the affidavits now submitted that the entry-woman had established residence on the land prior to her marriage. It is claimed merely that she had performed acts of settlement by having done certain work thereon. Under the terms of said act she must have established and maintained *bona fide* residence thereon prior to marriage to be entitled to make entry. It is not now claimed that she had done so and in her final proof she stated that she commenced living in her house on the land in June, 1902; that she lived in a tent on the land over a month before the house was completed in June. Therefore, even if the facts now offered at this late date were admitted as evidence, they would not show her to have been qualified to make entry. Furthermore, the record established the fact that she had failed to maintain *bona fide* residence on the land, and it tended strongly to support the contention that the entry was not made in good faith. Accordingly the motion for review and rehearing is denied.

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**ADJOINING FARM ENTRY—LEGAL SUBDIVISIONS—TOWN LOT NOT PROPER BASIS.**

WILLIAM F. ROEDDE.

*Decided November 22, 1910.*

Entries under section 2289, R. S., must be made in conformity to legal subdivisions; and where a forty-acre subdivision has been rendered fractional, the remaining area may be appropriated under that section only as an entirety.

Only such lands are available as basis for an adjoining farm entry as at the date of such entry occupy such a status that they might, if vacant on the records of the local office, be included in the entry; they being regarded, for administrative purposes, as constituting a part of the area so entered.

A town lot, or land appropriated to urban uses, can not be made the basis for an adjoining farm entry.

PIERCE, *First Assistant Secretary*:

July 19, 1909, William F. Roedde, the owner of three town lots in the townsite of Crescent Mills, filed application No. 01267, to make entry of agricultural land adjoining the same, under the provisions of section 2289, Revised Statutes, the area sought to be entered being described as the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 24, T. 26 N., R. 9 E., M. D. M., Susanville land district, California, containing seven and one-half acres. Accompanying the application was a

letter by applicant, stating that he "could not take a full ten acres without coming in contact with the Kelly Quartz Claim."

Upon considering the application, which was forwarded by the local officers to the General Land Office without action, the Commissioner, by decision of June 15, 1910, found that—

The records of this office show that the SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 24, T. 26 N., R. 9 E., M. D. M., is embraced in patented mineral entry No. 37, and that the remainder of the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said Sec. 24, is vacant public land except a small portion embraced in patented mineral entry 15, survey 46, Brilliant Quartz Mine.

He therefore required the applicant to show, by corroborated affidavit, the status of the Kelly Quartz Claim referred to in his application, and also the character of the land embraced therein, and to show cause why he should not embrace in his application the remaining available area in the said NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , Sec. 24, and to cause the Kelly Quartz Claim, if a valid mining location, to be segregated by appropriate survey and diagram.

From this action the applicant appeals, alleging that the Commissioner erred (1) in requiring him to show the status of the Kelly Quartz Claim, for the reason that that would call for a conclusion of law, which he is incompetent to give; (2) in requiring him to show the character of the land embraced in said claim, for the reason that that ground is not included in his application; and (3) in requiring him to include in his application the entire available area in the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , Sec. 24, for the reason that there is nothing in section 2289 of the Revised Statutes, or the regulations issued thereunder, that requires an applicant to include in his application any particular quantity of land; and, further, that it is unreasonable to require him to include land which he does not desire or which may be claimed by other parties.

Section 2289 of the Revised Statutes, under which the application is presented, requires lands to be entered thereunder "in conformity to the legal subdivisions of the public lands." The smallest subdivision recognized by the public land laws other than the placer mining laws, is a tract of 40 acres—that is, a tract in square form constituting one-quarter of a quarter section—except where, owing to certain peculiar local conditions, a tract irregular in shape and dimensions is noted upon the plat of survey as a legal subdivision. The NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said Sec. 24, wherein the land in question is situated, originally comprised a full quarter-quarter section, in square form, containing 40 acres. This subdivision, however, has since been reduced, by virtue of conditions set forth in the decision appealed from, to an area of approximately 28 acres, and now forms a single legal subdivision. Unless, therefore, such subdivision be further reduced in area by a segregation therefrom of such valid mining locations as

may lie wholly or in part within the same, which can be done only by an approved survey, the said area, as an entirety only, is subject to appropriation under the nonmineral laws. The so-called Kelly Quartz Claim, therefore, can be eliminated from this subdivision only by appropriate survey, which is required to be based upon satisfactory showing that the land embraced therein is in fact mineral in character, and that the claim is a valid one.

As heretofore stated, however, the applicant seeks to make the entry as an adjunct to lots 1 and 5, block 7, and lot 22, block 6 (containing 1.75 acres), of the patented townsite of Crescent Mills, which embraces the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of said Sec. 24, the lots described being situated, it is alleged, in the SW.  $\frac{1}{4}$  of the latter subdivision.

Section 2289, *supra*, authorizes the entry thereunder, by persons possessing the qualifications therein named, of one quarter-section, or a less quantity, of unappropriated public lands, to be located according to legal subdivisions, and provides that—

Every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres—

and by section 2290 it is provided that—

Any person applying to enter land under the preceding section shall first make and subscribe . . . . an affidavit . . . . that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, . . . . and that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence and cultivation necessary to acquire title to the land applied for.

The departmental instructions issued respecting these provisions (see General Circular of 1904, page 20) read as follows:

A person possessing the requisite qualifications under the homestead law (not having exhausted his right by previous entry thereunder), owning and residing on land not amounting in quantity to a quarter section, may enter other land lying contiguous to his own to an amount which shall not, with the land already owned by him, exceed in the aggregate 160 acres. For instance, if he has purchased or obtained from the Government (not under the homestead law) or from any other party 40 acres of land he can, under the provisions of the homestead law, enter 120 acres adjoining; if he is the owner of 80 acres he can enter another tract of 80 acres; if he is the owner of 120 acres he can enter 40 acres additional (sec. 2289, Rev. Stat.; Appendix No. 1, p. 153). The party must fulfill the requirements of the homestead law as to residence and cultivation, but will not be required to remove from the land which he originally owned in order to reside upon and cultivate that which he thus acquires under the homestead law, since the whole 160 acres are considered as constituting one farm or body of land, residence upon and cultivation of a portion of which is equivalent to residence upon and cultivation of the whole, except that patent for the adjoining homestead will not be issued until five years from date of entry thereof.

Said sections 2289 and 2290 are part of the homestead law, and clearly contemplate, as do the aforesaid regulations issued thereunder, that to be available as the basis for an adjoining farm entry, a tract relied upon for that purpose should, at the date of the additional entry, occupy such a status that it might, if vacant on the records of the local office, have been included in the entry, the area originally owned being regarded, for administrative purposes, as constituting a part of the entered area. It is on this theory only that a continuance of the entryman's residence on, and cultivation of, the area originally owned can be accepted as fulfilling the requirements of the homestead law with respect to the additional area.

It is well settled that land that has been appropriated to urban uses is not subject to homestead settlement and entry. (Norman Townsite *v.* Blakeney, 13 L. D., 399; Walker *v.* Lexington Townsite, 13 L. D., 404; Guthrie Townsite *v.* Paine *et al.*, 13 L. D., 562; North Perry Townsite *v.* Linn, 26 L. D., 393; Needham *v.* Northern Pacific R. R. Co., 26 L. D., 444; Turnbull *v.* Roosevelt Townsite, 34 L. D., 94; Aztec Land & Cattle Co. *v.* Tomlinson, 35 L. D., 161.)

It is evident, from the description the present applicant gives of the land sought to be used as the basis of an adjoining farm entry, that it has been appropriated to urban uses, in other words, is a town lot; and the Department is of opinion that ownership of and residence on a town lot bordering on public land subject to entry can not be made the basis for entry of the latter under the provisions of section 2289, Revised Statutes, above quoted. The application, therefore, even if perfected so as to meet the requirements of the decision of the Commissioner, could not be allowed, and, accordingly, will be rejected. As thus modified, the decision below is affirmed.

Nothing herein contained, however, will preclude the applicant, if legally qualified in that behalf, from making an ordinary homestead entry of the entire available area in the said fractional NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Sec. 24, but in that event he will be required to actually reside upon and cultivate the same for the necessary period.

#### **FORT MCKINNEY ABANDONED MILITARY RESERVATION.**

##### **INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., November 28, 1910.

REGISTER AND RECEIVER,  
Buffalo, Wyoming.

SIRS:

1. The Fort McKinney military reservation (post, wood and timber, camp and grazing) was established by Executive order of July



2, 1879, and was enlarged February 2, 1880. A portion of the reservation, 680.30 acres, was relinquished January 9, 1889, and the remainder was turned over to this Department for disposal under the act of July 5, 1884 (23 Stat., 103), by Executive order of December 5, 1894.

2. The survey of the reservation has recently been completed. As enlarged it contained 26,260.83 acres. Disposals have been made as follows: Included in school sections, 1,229.04 acres; granted to Johnson County 160 acres, and the county is authorized by the act of March 15, 1910 (36 Stat., 237), to purchase 320 acres additional, as noted on the appraised list; patented to the city of Buffalo, 563.76 acres; granted to the State for educational, etc., purposes, 1,272.82 acres, including the fort buildings; included in a national forest, 5,697.39 acres; included in coal withdrawals and classifications, 1,015.81 acres; and the remainder, 16,002.01 acres, has been classified as farming and grazing land, and appraised at from \$1.25 to \$25 per acre, the total appraisements being \$35,034.54.

3. The appraisers report that their examination did not disclose that the lands were mineral in character, and that they consider them generally valuable for grazing, and in some instances for farming; that your records show that part of the lands have been classified as coal lands which they have indicated on the schedule. It appears that the appraised lands in the reservation in T. 44 N., R. 78 W., were withdrawn for coal, but have not been classified, though the Geological Survey reports that there can be no question that the lands are coal lands; and 493.55 acres have been classified as coal by the Geological Survey. You will not offer for sale any of said withdrawn lands, or lands classified as coal.

4. The reservation was turned over to this Department subsequent to the passage of the act of August 23, 1894 (28 Stat., 491), and the lands are not subject to settlement and entry under said act, but will be disposed of in accordance with the provisions of said act of July 5, 1884.

5. Under the latter act the lands in Ts. 50 and 51 N., Rs. 82 and 83 W., classified as agricultural, farming and grazing, except said coal lands, and also excepting lands to be sold to Johnson County, marked on the appraised list, will be offered at public auction for cash at not less than the appraised price, by smallest legal subdivisions, in the order in which they appear on the appraised list, a copy of which is submitted separately.

6. You will sell the land by the acre at not less than the appraised price, and will require each subsequent bidder to increase the preceding bid 25 cents per acre; though you may, should you deem it advisable, reduce this limit to 10 cents per acre; for a portion or all of the

sale, the intention being to get full value for the land and to complete the offering as speedily as practicable.

7. The sale will take place at your office on January 18, 1911, commencing at 10 o'clock a. m., and will continue from day to day until completed. You will use due expedition in the conduct of said sale.

8. Payment will be required as follows: For each tract sold at \$1.25 per acre and less than \$2 per acre \$10 must be paid to the receiver as soon as practicable on the day the tract is sold; for each tract sold at \$2 and under \$4 per acre, \$20 must be paid to the receiver as soon as practicable on the day it is sold; for all tracts sold at \$4 or more per acre, a deposit of \$30 per tract will be required. Should the purchaser fail to pay the balance of the money due on his purchase to the receiver before January 28, 1911, he will forfeit the amount deposited by him. The receiver will issue the usual receipts upon payment of the required amounts, specifying thereon that it is for public sale, Fort McKinney abandoned military reservation. Upon full payment being made the register will issue cash certificate, specifying thereon, "Public sale, Fort McKinney abandoned military reservation." Should a bidder who has been awarded a tract, fail to make a deposit, you will no longer recognize him as a bidder at the sale.

9. The purchaser will be required to furnish evidence of his citizenship, if native-born, his affidavit to that effect, and if naturalized, record evidence thereof; and also a nonmineral affidavit. There is no limit to the amount of land a purchaser may buy at the sale.

10. The appraisers report that there are no settlers on any portion of the lands appraised who are residing upon or claiming the land for a home, or who settled on the reservation prior to January 1, 1884. There are, however, some minor improvements on the land, placed there by private parties, as shown by the appraised list. You will disregard said improvements in selling the lands.

11. Each day of the sale you will call the special attention of prospective bidders and read to them the following section of the Revised Statutes, viz:

SEC. 2373. Every person who, before or at the time of the public sale of any of the land of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree with any person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders, or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years or both.

You will keep close watch of the sale, and should you observe any attempt to hinder or prevent any person from bidding, you will at once call attention to the law quoted, and inform bidders that pur-

chasers who are guilty of fraud against the United States are liable to have their entries canceled and the money forfeited, as well as to suffer the penalties provided in said law. You will proceed with the sale, if deemed advisable by you, and make full report in the premises.

12. The lands remaining unsold after the offering closes, will not be subject to private entry, until after another offering, as provided in the act of July 5, 1884, above cited. You will retain the copy of the appraised list, however, for information relative to the mineral lands.

13. The receiver will furnish with his accounts a separate "Abstract of Collections on Public Sales (Fort McKinney abandoned military reservation)," depositing all money received in connection with the sale direct to the credit of the Treasurer of the United States, and will not carry same in his "unearned" account.

14. Notice of the offering, with authority for the publication thereof, has been sent to the Bulletin and Voice, published at Buffalo, Wyoming; the Post and Enterprise, published at Sheridan, Wyoming; and the Wyoming Tribune (daily), published at Cheyenne, Wyoming. You will post a copy of said notice in your office.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary.*

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#### SETTLEMENT—EXTENT OF CLAIM.

TOLES *v.* NORTHERN PACIFIC RY. CO. ET AL.

*Decided November 30, 1910.*

A settlement upon land not subject thereto may not be imputed as an authorized settlement upon an adjoining legal subdivision within a different technical quarter-section, as against an intervening adverse claim lawfully initiated.

PIERCE, *First Assistant Secretary:*

This is a duly entertained petition on behalf of the Northern Pacific Railway Company, addressed to the supervisory power of the Secretary of the Interior, to which answer was filed by counsel for William M. Toles October 26, 1910, for review and reconsideration of departmental decision of December 1, 1909 (not reported), affirming, with certain modifications, a decision of the Commissioner of the General Land Office of May 19, 1909, which held for cancellation the selection made by the railway company, per list No. 76, under the act of March 2, 1899 (30 Stat., 993), embracing the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  of Sec. 6, T. 43 N., R. 3 E., Coeur d'Alene

land district, Idaho, it being held in said decision that the homestead claim of said William M. Toles, based upon settlement prior to survey, and prior, also, to selection by the railway company, was the superior claim to said land.

In the decision under review, and in departmental decision of March 23, 1910, denying a motion for review thereof, it was shown that in July, 1901, the said Toles established residence in a cabin upon the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of the same section; that at the time of settlement he posted a certain notice or notices on his cabin and to the east of his cabin, which recited that he claimed the land one-half mile east and three-quarters of a mile south of such cabin; that at that time this section was unsurveyed, and that on October 1, 1901, the Northern Pacific Railway Company selected the said S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the said W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  under said act of March 2, 1899; that the plat of the survey of this township was filed in the local land office October 5, 1906, that Toles presented his homestead application for said land on that day, and that on November 7, 1906, the railway selection was adjusted to the lines of the public survey; that in view of Toles's allegation of settlement a hearing was ordered, which was had, from which the Department found that Toles made his settlement as alleged by him, such settlement, however, being upon the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of the section, but that inasmuch as he had posted notices claiming one-half mile east and three-quarters of a mile south, it was held that his notice extended to lands in different legal subdivisions from that upon which his settlement was made, but that the settlement being upon unsurveyed land he would not be heard to say that he did not claim the land upon which his cabin was located; that if he took this tract, as he must upon a settlement of unsurveyed lands, then he would be required to relinquish his claim to one of the other subdivisions involved therein. Pursuant to this decision and the direction contained therein, the Commissioner of the General Land Office, by letter of April 2, 1910, instructed the local officers to call upon Toles to file a homestead application covering the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , together with the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , less one forty-acre tract in one of the two last named subdivisions, preserving the contiguity of the tracts as applied for, and advise him that he must at the same time file a waiver as to the tract surrendered. Following this, on May 18, 1910, the Commissioner of the General Land Office reported to this Department that upon examination it had been found that the said SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  is included in the Northern Pacific Railway Company's list, No. 61, of selections filed June 21, 1901, under the said act of March 2, 1899, and that it was also included in the homestead application of one Wallace N. Toles, covering the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of said Sec. 6, which application was rejected by the

local land officers for conflict with the company's said selection list No. 61, and that this action was sustained by the General Land Office decision of November 9, 1907, and affirmed by the Department on appeal May 26, 1909, and that on May 3, 1910, the local officers were instructed by telegram to suspend action under said letter of April 2, 1910, until further advised, and the entire matter was submitted for further consideration and instructions by the Department.

It was thus found, upon two readings of the record, that the residence established by William M. Toles in July, 1901, was upon the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of said section, and a further examination of the testimony upon this question, responsive to insistence of counsel for Toles that such finding was not justified, impels the conclusion that the Department has not erred in this matter, and inasmuch as it was further found, appears to be the fact, and is not denied, that this tract had been appropriated by the prior selection of the company, it results that the settlement of Toles initiated no claim thereto. Under the further known facts and necessary inferences of the case it is not now thought that he may claim the benefit of a settlement upon the lands involved in this case when he could not, in law, have initiated a claim to the particular subdivision upon which he actually settled. When, after an absence of several months, he returned to the claim in the spring of 1902, which was long after the selection by the company of the land involved in the present case, he concluded as he says, that said cabin was not on the land claimed by him, and so he moved into a cabin upon the land in controversy, which, in the meantime, had been purchased by him or for him from a prior settler. It thus appears that not only the subdivision upon which he settled, but the land here in controversy, or some of it, at least, was claimed by a prior settler.

It is with much apparent earnestness argued upon the answer to this petition, that although it be admitted that the original settlement of Toles was upon the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , still, that settlement, by reason of the notice given of the claim then made, initiated, under well settled rulings of the land department, a prior valid claim to lands within the adjoining legal subdivisions, being the lands here in controversy. As part of this insistence, inquiry is made whether, under such circumstances, a "settler upon unsurveyed land is not entitled to the benefit of the wise and just decisions of the Department which hold that the making of improvements and establishment of residence on land adjoining that intended to be claimed under a mistaken belief that the same were on the land claimed, will be imputed to the land for which they were intended, and will constitute a compliance with the law." The cases cited, and the available authorities upon this proposition, have been examined, and none of them applied to the facts here presented sustain it.

Here, the particular subdivision settled upon was not subject to settlement, and an unauthorized settlement upon one legal subdivision may not be imputed as an authorized settlement upon another legal subdivision of the public lands within a different technical quarter-section, as against an intervening adverse claim lawfully initiated.

Under the circumstances, the Department is constrained to sustain the company's petition. It results that the decision complained of must be and the same is hereby vacated. The homestead application of William M. Toles will be rejected, and the selection of the railway company permitted to stand.

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**REPORTS, HEARINGS, AND APPEALS IN CASES INVOLVING CLAIMS TO LANDS WITHIN NATIONAL FORESTS.**

**CIRCULAR.**

*Washington, D. C., November 25, 1910.*

TO THE COMMISSIONER, CHIEF OF FIELD SERVICE, CHIEFS OF FIELD DIVISION, REGISTERS AND RECEIVERS, GENERAL LAND OFFICE, DEPARTMENT OF THE INTERIOR; THE FORESTER, DISTRICT FORESTERS, FOREST SUPERVISORS, FOREST SERVICE, DEPARTMENT OF AGRICULTURE; THE SOLICITOR AND DISTRICT ASSISTANTS TO THE SOLICITOR, DEPARTMENT OF AGRICULTURE.

GENTLEMEN: To better effectuate cooperation in protecting the interests of the Government and settlers and other claimants to lands within National Forests, the following order is effective, superseding order of June 25, 1910 (39 L. D., 52):

1. Forest Supervisors will submit all reports made by Forest Officers to the proper District Forester, who will make a careful examination of them.

If the District Forester is of the opinion that no contest should be instituted he will transmit the report directly to the proper Chief of Field Division with an endorsement of "No protest," except that in the case of claims under the mining laws which have not been examined for mineral discovery, the notice of "No protest" will be by letter from the District Forester to the Chief of Field Division, instead of by the transmittal of an endorsed report. Should the Chief of Field Division desire further information he will return the report directly to the District Forester, requesting such additional investigation as may be necessary; or, if he deems it advisable, he will cause an Agent of the General Land Office to make such additional investigation. If the Chief of Field Division is of opinion that no hearing is necessary, he will transmit the report, or the letter of "No protest," to the Commissioner of the General Land Office with his recommendations.

If the District Forester is of opinion that a contest should be instituted he will refer the report to the District Assistant to the Solicitor for examination as to the sufficiency of law and evidence, and if found to be sufficient he will return it to the District Forester with a draft of the charges against the claim to be recommended to the Chief of Field Division. If the District Assistant to the Solicitor is of opinion that additional evidence is necessary, he will call this to the attention of the District Forester, who will order such additional investigation as may be required and will resubmit the report with the additional evidence to the District Assistant to the Solicitor, who, if then satisfied that a contest should be instituted, will pursue the course outlined above. When the final report, with the draft of charges to be recommended to the Chief of Field Division, is returned to the District Forester by the District Assistant to the Solicitor, the District Forester will transmit it directly to the Chief of Field Division with a recommendation that a contest be instituted upon the charges indicated. If the District Assistant to the Solicitor, after full review of the final report, is of opinion that a contest should not be instituted, he will so advise the District Forester and if the latter is still of opinion that a contest should be instituted, the papers in the case will be referred to the Forester for consultation with the Solicitor, and, if need be, for submission to the Secretary of Agriculture, and, after decision, the papers will be returned by the Forester to the District Forester with notice of decision and appropriate instructions. Should the Chief of Field Division find the report, in his opinion, insufficient to warrant adverse proceedings, he will return it directly to the District Forester, requesting such additional investigation as may be necessary; or, if he deems it advisable, he will cause an Agent of the General Land Office to make such additional investigation. If, after receipt of the complete report, the Chief of Field Division is of opinion that adverse proceedings should be ordered, he will transmit the report, together with the District Forester's letter of recommendations, to the Commissioner of the General Land Office with a letter of transmittal recommending the ordering of a hearing before the Register and Receiver upon the charges suggested by him and noted in his letter of transmittal. If, after receipt of complete report from the District Forester recommending adverse proceedings, the Chief of Field Division is of opinion that a hearing is unwarranted, he will transmit the report, the District Forester's letter of recommendations, and his own recommendations to the Commissioner of the General Land Office for decision. Should the Commissioner of the General Land Office approve the recommendations of the Chief of Field Division, he will notify the Solicitor of the Department of Agriculture.

2. Upon order or application for hearings upon reports covering lands or claims within a National Forest, the Register and Receiver will send duplicate notices thereof to the Chief of Field Division and the proper District Assistant to the Solicitor. Before setting date for the hearing in any such case, the Chief of Field Division will confer with the proper District Assistant to the Solicitor and thereupon suggest to the Register and Receiver a date for hearing, and the names of witnesses to be subpoenaed upon behalf of the Government. In the event the Chief of Field Division and the District Assistant to the Solicitor are unable to agree as to the date of hearing, the matter will be referred by the Chief of Field Division to the Commissioner of the General Land Office, who will issue the necessary directions.

3. In all hearings affecting lands or claims within a National Forest, the Chief of Field Division or a Special Agent of the General Land Office, and the District Assistant to the Solicitor, will be entered of record as appearing on behalf of the Government. The Chief of Field Division or Special Agent of the General Land Office acting as attorney for the Government in any such case will control the Government's side of the case in any matter as to which counsel are unable to agree, subject to any direction that may be given by the Commissioner of the General Land Office in case the matters of difference are of such importance as to be presented to him for action.

4. In all Government cases before Registers and Receivers involving lands or claims within a National Forest, the Chief of Field Division and the District Assistant to the Solicitor shall each be served with notice of all appeals, motions, orders, and decisions required to be noted under the rules in cases of private contests. The proper Law Officers of the Department of Agriculture shall also have a right of appeal from any decision by the Commissioner of the General Land Office, and to file motion for review in the Department, or take other like action in the same manner as a private contestant; and shall receive like notices of proceedings and decisions: Provided, however, that the Department of Agriculture shall not be required to take formal appeals from decisions of Registers and Receivers.

5. Costs incident to hearings before Registers and Receivers in Government cases involving lands or claims within a National Forest will be paid under rules now in force. Expenses incident to appeals will be paid by the Department of Agriculture; except that, where feasible, Chiefs of Field Division may give aid in office work in preparation of papers, briefs, etc.

Very respectfully,

R. A. BALLINGER,  
*Secretary of the Interior.*

JAMES WILSON,  
*Secretary of Agriculture.*



## MAY v. STATE OF WASHINGTON.

*Decided December 3, 1910.*

## SCHOOL INDEMNITY SELECTION—HOMESTEAD APPLICATION—PROTEST.

A homestead application tendered while the land applied for was embraced in a *prima facie* valid school indemnity selection, accompanied by a protest against the selection on the ground of insufficient base, does not present such an adverse claim as will prevent substitution by the State, in a proper case, of a good and sufficient base, where the defect charged in the protest was shown by the records of the General Land Office and action on that ground instituted against the State's claim before any cognizance of the protest was taken by that office.

PIERCE, *First Assistant Secretary*:

This case is before the Department on the cross appeals of Warren B. May and the State of Washington from the decision of the Commissioner of the General Land Office, rendered July 30, 1910, rejecting May's homestead application for the NW.  $\frac{1}{4}$ , Sec. 12, T. 25 N., R. 12 W., Seattle, Washington, land district, and dismissing the State's application to be allowed to amend its school land indemnity selection presented for said tract.

It appears that the State of Washington on September 9, 1905, presented indemnity selection for said tract, together with other lands, and assigned as base in support of the selection of this tract an alleged loss of school land in fractional T. 32 N., R. 46 E., along the Idaho boundary line; that on September 22, 1909, May presented homestead application for said tract and filed therewith a protest against the State's list in so far as the tract involved herein was concerned. This protest alleged that the State had already used all of the base to which it was entitled in the fractional township 32 north, range 46 east, and for that reason the selection was invalid and should be canceled.

By letter dated January 3, 1910, the register and receiver advised May that his homestead application was rejected December 29, 1909, for reason of conflict with the State's selection, and May subsequently prosecuted an appeal to the General Land Office. In the meantime, however, namely, on December 31, 1909, the Commissioner of the General Land Office, without reference to, and apparently without knowledge of, the pending homestead application of May and his protest against the State's selection, in a letter addressed to the register and receiver, directed that the State be allowed sixty days in which to show cause why the selection should not be canceled for reason of invalidity of base. In response to that action there was filed under date of June 21, 1910, a statement, under oath, of the Commissioner of Public Lands of the State of Washington, in accordance with the regulations of April 25, 1907, as amended May 24,

1910, explaining the cause of the original tender of the defective base and asking that the selection be amended by the substitution of good and valid base.

Rule thirteen of the regulations respecting the selection of school indemnity lands, as amended May 24, 1910, provides that amendment of indemnity school land selection by the substitution of new or valid bases in whole or in part in place of those originally tendered, or defective for any cause, may be allowed in the discretion of the Commissioner of the General Land Office; that applications in such cases must be accompanied by a statement, under oath, of the proper officer or officers of the State fully explaining the tender of the original defective base and showing how the error or mistake occurred, and in such case the substitution of new and valid base "may be permitted in cases where no intervening claims exist."

The Commissioner, in his decision of July 30, 1910, holds that under the well-established rules no rights were acquired by the tender of May's homestead application, for the reason that when presented the land was embraced in a *prima facie* valid State selection, and that inasmuch as the list was held for cancellation by the General Land Office of its own motion, no action is necessary on May's protest. The Commissioner further holds, however, that May's application, ineffective though it may be and securing him no rights by reason thereof, must be considered as an adverse claim to the tract involved, and that for that reason the State's application to amend can not be allowed. As above stated, both parties have appealed to the Department.

As held by the Commissioner, the rule is well settled that no rights are acquired by the mere tender of an application for lands embraced in an existing *prima facie* valid entry or selection. Therefore, by the presentation of his homestead application May acquired no rights whatever.

While it is true that his protest contained a correct statement of the invalidity of the base assigned by the State in support of its selection, nevertheless, that defect was shown by the records of the General Land Office and cognizance was actually taken thereof, apparently prior to the receipt in the General Land Office of May's protest. This being so, there does not appear to be any error in the Commissioner's decision refusing to proceed against the State's selection on May's protest, because, as indicated above, before cognizance was taken of such protest action had been already instituted against the State's claim.

The regulations respecting the selection of school indemnity lands, as amended by the order of May 24, 1910, provides that where, through mistake or inadvertence, defective base is assigned in support of a selection, and proper care has been exercised by the officers

of the State in making the selection, the State should be allowed an opportunity of amending its application by the substitution of good and sufficient base. It is shown by the affidavit of the State Commissioner of Public Lands, filed in this case, that the assigning of invalid base for the selection under consideration was due to inadvertence and mistake by the clerical force in the office of the State's Public Land Commissioner, owing partially to the fact that the State's records have not heretofore been kept in an accurate and proper manner; that a new method is being devised whereby all mistakes may be discovered and corrected as soon as possible; and, finally, that the tender of invalid base was not made for the purpose of imposing upon the government of the United States by the making of selections which could not finally be approved, but that the State has been and is acting in entire good faith in the matter and in the honest endeavor to expedite the selection of lands granted to it by Congress.

It is not believed that mere paper application, such as May presented in this case, constitutes an intervening claim entitled to recognition as such, under the regulations as amended. He has lost no rights by the presentation of his homestead application and may go elsewhere and make entry. The State, on the other hand, has been exercising a claim over the land for more than five years; has paid the fees required by law, and, possibly, has either sold the tract or is under contract to do so.

The entire matter considered, the Department finds that the homestead application of May was properly rejected; that his protest was, under the circumstances, entitled to no consideration; and that the State's application to amend, in so far as this particular tract is concerned, should be allowed.

The decision of the Commissioner is modified accordingly.

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LOUISE H. SPENCER.

*Decided December 6, 1910.*

TIMBER AND STONE APPLICATION—PREFERENCE RIGHT—APPRAISED VALUE.

The fact that an applicant under the timber and stone act, subsequent to the regulations of November 30, 1908, is a successful contestant and makes application in exercise of the preference right resulting from a contest initiated prior to such regulations, does not entitle him to purchase at the minimum rate of \$2.50 per acre, but he will be required to pay the appraised value of the land.

PIERCE, *First Assistant Secretary:*

Louise H. Spencer has appealed to the Department from the decision of the Commissioner of the General Land Office of August 13,

1910, sustaining the action of the local officers involving the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 33, T. 37 N., R. 6 E., W. M., Seattle, Washington, land district, and notifying her that the land and timber thereon, based on her timber and stone application therefor, had been appraised at the sum of \$1410.

It is contended upon this appeal that claimant is entitled to purchase said land at the price of \$2.50 per acre, without appraisement, in the exercise of her preference right obtained as the result of a successful contest against a former homestead entry of the tract of one Frank P. March, and that her application can not be subject to the appraisement. Claimant's application was filed February 16, 1909, and is clearly subject to the departmental regulations of November 30, 1908 (37 L. D., 289). The contention that claimant's preference right gave her a vested right which can not be taken away or reduced in value is contrary to the settled holding of the Department, it having been held that a successful contestant does not acquire such a preference right of entry as will, prior to its exercise, except the land from the operation of a withdrawal for irrigation purposes under the act of June 17, 1902. (Emma H. Pike, 32 L. D., 395.) This is true even where the preference right of entry is recognized to such an extent as to be allowed in case the land withdrawn is again restored to the public domain. (See case of Wright v. Francis, 36 L. D., 499.) If the exercise of a preference right can be entirely denied by a withdrawal of the land from entry, it follows that the impairment of the value of such preference right claimed to be occasioned by the appraisement provided for in said circular of November 30, 1908 (37 L. D., 289), is clearly within the authority of the Department.

The decision appealed from is affirmed.

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ROBERT J. SLATER.

*Decided December 6, 1910.*

**DESERT ENTRY WITHIN RECLAMATION PROJECT—ELECTION OF ENTRYMAN.**

A desert entryman whose land is included within a reclamation project may elect to proceed with the reclamation thereof on his own account, and thus acquire title to all, or so much of, the land included within his entry as he can secure water to irrigate, or accept the conditions of the reclamation act and acquire title thereunder to 160 acres; but he can not avail himself of both the reclamation project and other means of reclamation and thus acquire title to more than 160 acres of land.

*PIERCE, First Assistant Secretary:*

Robert J. Slater, on February 20, 1903, made desert land entry No. 01793, La Grande, Oregon, land district, covering the E.  $\frac{1}{2}$ ,

Sec. 7, T. 4 N., R. 29 E., W. M., amounting to 320 acres, anticipating obtaining water for the reclamation thereof from the Inland Irrigation Company, later known as the Furnish Ditch Company.

Thereafter the Umatilla Project was instituted and a large part of the land described included within its boundaries, a portion thereof being withdrawn for contemplated works.

February 13, 1907, Slater applied for water right under said project for his entire entry, and a month later requested permission to withdraw the same. It does not appear what action was taken on the request for withdrawal, but, on November 7, 1908, the water application was approved for the full 320 acres, and on December 1st following was reduced to 139 acres, the latter being the area of the entry irrigable from the government project. Slater has paid the first instalment of all project charges, the second not being due until December 1, 1910.

Final proof was submitted on March 23, 1910, which, as ultimately supplemented, shows right to water to irrigate 181 acres from the Furnish Ditch Company and 139 acres from the Umatilla Project.

In the decision appealed from rendered June 17, 1910, it was declared that—

Slater must relinquish all the lands embraced in his entry in excess of 160 acres, provided he obtains water in connection with the Umatilla Irrigation Project. . . . In order to obtain water for any portion of his entry under the government project he must reduce the total area (of the entry) to the same area as is allowed for homestead entries and water rights for lands in private ownership—

and he was allowed sixty days within which—

to relinquish . . . in excess of 160 acres or to relinquish that portion of his entry embraced within the government reclamation project.

It was further held that, because of first form withdrawal of part of the lands, certificate could not issue until determination that the same were not required for construction purposes.

There is no specific provision in the reclamation act covering lands entered and thereafter included within the boundaries of a reclamation project, it being only provided that entries "during withdrawal" must be subject to the act and "that the entryman upon lands to be irrigated by such works" must reclaim one-half of the land, etc.; but, by section 5 of the act of June 27, 1906 (34 Stat., 519), referring to *bona fide* desert land entries embraced within the limits of a reclamation project, it was declared that—

if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June 17, 1902, and shall relinquish all land embraced within his desert land entry in excess of 160 acres, and as to such 160 acres retained he shall be entitled to

make final proof and obtain patent upon compliance with the terms of payment prescribed in said act . . . and not otherwise. But nothing herein contained shall be held to require the desert land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

It is to be observed that the provisions of the act just quoted leave undisturbed the entryman of desert land covered into a reclamation project who owns a water right and has reclaimed the land; but, as to other desert land entrymen it requires that, if the reclamation project is carried to completion so as to make available a water supply for the land embraced in the entry, they—

shall . . . comply with all the provisions of the act . . . and shall relinquish all land embraced within his desert land entry in excess of 160 acres.

One of the purposes of the reclamation act is to make the land within a project available to as many persons as can consistently be supported therefrom, such purpose to be accomplished by limiting each entry to an acreage sufficient to support a family, and, in no event, to exceed 160 acres; and the latter limitation has been carried into the act of 1906.

If the government project were completed so as to make available a water supply for the gross area (160 acres) which the entryman could retain upon election to accept the conditions of the reclamation act, the case would be comparatively free from difficulty; such, however, is not the case, water being available from the reclamation project for but 139 acres, and the authority of the government to insist upon delimitation of the entry as a condition to supplying water from the project is strenuously contested. It must be borne in mind that an entryman under the desert land law whose land is included within the limits of a project is left entirely free to elect whether to proceed with the reclamation on his own account, and thus acquire title to all, or so much of, the land included within his entry as he can secure water to irrigate, or to accept the conditions of the reclamation act, and acquire title thereunder to 160 acres. It was manifestly not the intention of Congress to permit such an entryman, however, to avail himself of both the reclamation project and other means of reclamation and thus acquire title to more than 160 acres of land. Yet, if the entryman's contention in the present case were sustained such would be the inevitable result.

That portion of the Commissioner's decision, however, requiring the entryman to relinquish that portion of the land embraced within the reclamation project is erroneous; because the existence of such project in no manner deprives him of the right to proceed to acquire title to all or so much of the tract as he is able to reclaim in accordance with the desert land laws.

It is believed that disposition of the present controversy, as above indicated, will not only conform to the spirit of the laws in question, but will work no injustice either to pursue that course which will, in his judgment, secure for him the best results, and at the same time avoid the entryman from obtaining title to a part of the desert entry under the desert land laws, and to another part under the reclamation act, the aggregate exceeding what he could reclaim under the former, and the amount limited under the provisions of the latter.

In view of the entryman having been accorded right to 139 acres with apparent knowledge on the part of the government officers that he was proceeding to acquire water from private sources, and also of the apparent refusal to permit him to withdraw his application, he will be allowed thirty days from notice hereof to elect whether to accept the provisions of the reclamation act and delimit the desert entry to 160 acres, which shall include the area now irrigable from the project, or withdraw his application for water from the government and proceed entirely under the desert land law. In default of election to proceed in one of the ways indicated within the time allowed, his entry will be cancelled to the extent of 160 acres, lying outside the present irrigable limits of the Reclamation Project, and the entry as to the remaining area allowed to stand subject to future compliance with law.

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HARRIS *v.* DIAMOND.

*Decided December 6, 1910.*

FOREST LIEU SELECTION—"VACANT" LAND—PUBLIC CEMETERY.

Land actually in use as a public cemetery is not "vacant" within the meaning of the act of June 4, 1897, and is not subject to selection under that act.

PIERCE, *First Assistant Secretary:*

This is an appeal by Elizabeth Dimond, through John Boyd, attorney in fact, from the decision of the Commissioner of the General Land Office of October 4, 1910, ordering a hearing upon the protest of P. S. Harris against forest lieu selection No. 3586, made October 9, 1900, at Waterville, Washington, for the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 6, T. 38 N., R. 26 E., W. M., in lieu of the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 16, T. 28 S., R. 34 E., M. P. M., within what was formerly known as the Sierra Forest Reserve, California. The nonoccupancy affidavit was executed October 4, 1900, by John Boyd, and the protest, filed August 6, 1910, alleges that the land was long prior thereto and has ever since been used and occupied as a public cemetery.

The title to the base land is ultimately derived from a patent for said section 16, issued January 20, 1899, to Elizabeth Dimond by the State of California. The selections based thereon formed one of the

counts in an indictment against F. A. Hyde *et al.*, in which it was alleged that said Elizabeth Dimond was a fictitious person, and upon which Hyde was convicted, the matter being now before the Supreme Court of the United States upon a petition for a writ of certiorari to the Court of Appeals for the District of Columbia.

The appellant contends (1) that there is nothing in the act of June 4, 1897 (30 Stat., 36), under which the selection was made, which prohibits the selection of land used as a public cemetery, and (2) that the land is already involved in another hearing, relative to the townsite of Loomis.

As a general rule an order for hearing, by the Commissioner of the General Land Office, is not appealable; but in view of the fact that if the contentions of the appellant are sound, the allegations of the protest, even if proven, would be insufficient to cause the rejection of the selection, the Department will take jurisdiction of the matter.

The appellant urges that it was the intention of Congress to permit the acquisition of public lands for cemetery purposes either (1) under the act of June 4, 1897; (2) by conveyance from a settler under the homestead law by virtue of section 2288, Revised Statutes; (3) under the act of September 30, 1890 (26 Stat., 502), authorizing the sale for such purposes of not exceeding one quarter-section to incorporated cities or towns, or (4) under the act of March 1, 1907 (34 Stat., 1052), authorizing a similar sale, but not exceeding eighty acres, to any religious or fraternal association or private corporation empowered to hold real estate for cemetery purposes, the title to revert to the United States should the land be sold or cease to be used for that purpose.

The act of June 4, 1897, provided for the exchange of privately owned lands within a forest reserve for an equal area of vacant non-mineral public land open to settlement. There is nothing in the act from which it can be inferred that Congress intended that it should be the medium through which public lands used for cemetery purposes could be acquired. The question, in reality, is whether land used as a public cemetery at the time of selection is "vacant," within the meaning of the act.

This term has been construed several times by the Department. In *Kern Oil Co. et al. v. Clarke* (31 L. D., 288) it was held that the term was used in its primary and ordinary sense of *unoccupied*, and not in a special, restricted, or technical sense, intended only to describe land "not taken or appropriated of record." In *Charles H. Cobb (Idem., 220)* it was held that proof that land is uninhabited is not the equivalent of proof that it is vacant or unoccupied. In *Leaming v. McKenna (Idem., 318)* a statement in the nonoccupancy



affidavit, that the selected land was "unoccupied by any one having color of title thereto," was not a proper showing respecting the condition of the land. In *Litchfield et al. v. Anderson* (32 L. D., 298) the syllabus reads:

Land actually occupied is not "vacant land open to settlement," within the meaning of the act of June 4, 1897, and is therefore not subject to appropriation under said act; and any question as to whether the occupancy is such as meets the requirements of the homestead or other laws, or whether the occupant is qualified to assert and maintain a claim under those laws, will not be tried and determined under an application to select the land under said act.

It can not be doubted that if the selected land were actually in urban use by townsite settlers, such occupation would bar its acquisition under the act of June 4, 1897. A cemetery is a necessity for any town or other community, and the use of public lands for such purpose has been recognized by the above cited legislation of Congress. The Department is therefore of opinion that land actually in use as a public cemetery is not vacant, and can not be selected under the act of June 4, 1897; and it is also immaterial whether the protestant is qualified to purchase the land for that purpose under the foregoing acts of Congress or not, in accordance with the principle laid down in *Litchfield et al. v. Anderson, supra*.

The second contention of the appellant is also not well taken. This relates to a hearing ordered by the Commissioner October 12, 1908, as to forest reserve lieu selections Nos. 1034 and 1040, and extended March 11, 1909, to include Nos. 1035, 1036, 1038, 1041 and 1042, all made by Elizabeth Dimond, through John Boyd, attorney in fact, for certain lands in Sec. 1, T. 38 N., R. 25 E., upon a protest that at the time of selection the land was in urban occupancy as the townsite of Loomis. The present land is about one-half mile distant therefrom, and its use and occupation as a public cemetery by any community, whether the town of Loomis, or some other, would bar its selection.

The decision of the Commissioner is accordingly affirmed; but this action is taken without in any way passing upon the validity of the base offered.

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RICARD L. POWEL.

Motion for review of departmental decision of September 8, 1910, 39 L. D., 177, denied by First Assistant Secretary Pierce, December 6, 1910.

## INSTRUCTIONS.

## NOTICE OF RESTORATION—TEMPORARY FOREST WITHDRAWALS.

Directions given that publication of notices of restoration to settlement and entry of lands temporarily withdrawn with a view to possible inclusion in a national forest be reduced to a period of four successive weeks.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, December 7, 1910.*

The Department has received letters prepared in your office authorizing the publication for a period of ten weeks, one issue each week, of notice of restoration of the public lands to settlement and entry, which were withdrawn for the purpose of ascertaining whether or not they were suitable for inclusion in the Zuni National Forest, New Mexico.

Accompanying the letters is a memorandum prepared in your office, in which it is stated that the letter authorizing the publication of notice for ten weeks prior to date of settlement, is prepared in accordance with the prevailing practice in such cases. It is suggested in the memorandum, however, that the period of ten weeks is unnecessarily long for the publication to run, and inasmuch as the amount appropriated by Congress to pay for publications of this nature is limited, that the period should be reduced to four weeks.

The act of June 11, 1906 (34 Stat., 233), which provides for the elimination of agricultural lands from forest reserves and their restoration to homestead entry, requires publication once a week for four successive weeks, and there would seem to be no reason why longer publication should be had in cases where the lands involved are merely temporarily withdrawn with a view to their possible inclusion in a national forest.

The papers are therefore returned, to the end that your office may prepare new notices in accordance with the views expressed herein. This rule will also govern in all future cases of a like nature.

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**ENLARGED HOMESTEAD—FORM OF AFFIDAVIT—SEC. 6, ACTS FEBRUARY 19, 1909, AND JUNE 17, 1910.**

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., December 8, 1910.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: The Department has considered your office letter of December 6, 1910, submitting a new form of affidavit to be required of persons making entry under sections six of the acts of February 19, 1909

(35 Stat., 639), and June 17, 1910 (36 Stat., 531), and approves of the proposed changes. The form of affidavit is returned herewith [see below].

Very respectfully,

R. A. BALLINGER,  
*Secretary.*

(Form approved by the Secretary of the Interior December 8, 1910.)

# HOMESTEAD ENTRY.

(Enlarged Homestead Acts, Section 6.)

U. S. LAND OFFICE, \_\_\_\_\_, Serial No. \_\_\_\_\_

## APPLICATION AND AFFIDAVIT.

Receipt No. \_\_\_\_\_

I, \_\_\_\_\_ (\_\_\_\_\_),  
(Give full Christian name.) (Male or female.)

a resident of \_\_\_\_\_, do  
(Town, County, and State.)

hereby apply to enter, under section 6 of the act of February 19, 1909 (35 Stat., 639), or section 6 of the act of June 17, 1910 (36 Stat., 531), (in Utah erase the act of 1910; in Idaho, the act of 1909), \_\_\_\_\_ Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, \_\_\_\_\_ Meridian, containing \_\_\_\_\_ acres, within the \_\_\_\_\_ land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I \_\_\_\_\_

(Applicant must state whether native born, naturalized, or has filed declaration of intention to become a citizen. If not native born, certified copy of naturalization or declaration of intention, as case may be, must be filed with this application.)  
citizen of the United States, and am \_\_\_\_\_

(State whether the head of a family, married or unmarried, or over twenty-one years of age, and if not over twenty-one, applicant must set forth the facts which constitute him the head of a family.)

that my post-office address is \_\_\_\_\_; that this application is honestly and in good faith made for the purpose of actual cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I have not heretofore made any entry under the homestead, timber and stone, desert land, or preemption laws (except) \_\_\_\_\_

(Here describe former entry or entries by section, township, range, land district, and number of entry; how perfected, or if not perfected, state that fact.)

that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian; that the lands applied for do not contain merchantable timber, and no timber except -----

(Here fully describe amount and kind of timber, if any.)

that it is not susceptible of successful irrigation at a reasonable cost from any known source of water supply except the following areas: -----

(Give the subdivision and area of the lands, if any, susceptible of irrigation.)

and because of the lack of a sufficient supply of water suitable for domestic purposes continuous residence on the lands applied for is not possible.

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by -----

(Give full name and -----);) that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in -----

(Town.)

-----, within the ----- land district, this -----

(County and State.)

day of -----, 19--

(Official designation of officer.)

We, -----, of -----, and -----, of -----, do solemnly swear that we are well acquainted with the above named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by -----); and that said affidavit was duly subscribed to before me at ----- this ----- day of -----, 19--

(Official designation of officer.)

UNITED STATES LAND OFFICE at \_\_\_\_\_,  
\_\_\_\_\_, 19---

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under section 6 of the act of February 19, 1909, or section 6 of the act of June 17, 1910 (in Utah strike out the act of 1910; in Idaho strike out the act of 1909); that there is no prior valid adverse right to the same, and has this day been allowed.

\_\_\_\_\_  
Register.

UNITED STATES CRIMINAL CODE.—Chap. 6.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act, March 4, 1909. 35 Stat., 1111.).

HANLEY *v.* NORTHERN PACIFIC RY. CO.

*Decided December 8, 1910.*

NORTHERN PACIFIC ADJUSTMENT—SETTLEMENT CLAIM.

Where the Northern Pacific Railway Company declines to relinquish a tract under the act of July 1, 1898, in favor of a claimed settlement right, on the ground that it has sold or contracted to sell the land, the settler is entitled, where the records of the county in which the land lies do not evidence such sale or contract, to take issue upon the allegation of sale and to have a hearing to ascertain whether such sale or contract has in fact been made.

*PIERCE, First Assistant Secretary:*

Hugh C. Hanley appealed from decision of the Commissioner of the General Land Office of April 21, 1910, rejecting his homestead application for homestead entry for the NE.  $\frac{1}{4}$ , Sec. 9, T. 5 N., R. 3 E., Vancouver, Washington, and allowing transfer of his settlement claim to other land.

The land is within primary limits of grant to the Northern Pacific Railroad Company, by joint resolution of May 31, 1870 (16 Stat., 378). September 20, 1882, the line of road was definitely located opposite the tract, which was listed by the company August 6, 1895, by list 56. The land has not been patented.

March 10, 1903, Hanley filed his homestead application in the local office, which it transmitted to the General Land Office. April 22, 1907, Hanley was called upon to elect under act of July 1, 1898 (30 Stat., 597, 620), whether he would hold the land or would relinquish and take land elsewhere. He elected to hold his settlement claim. April 11, 1908, the land was included in list 209, for relinquishment by the Northern Pacific Railway Company. September 25, 1908, the railway company submitted evidence showing sale of

the land, March 2, 1902, to the Weyerhaeuser Timber Company for value, for which reason the railway company was unable to and declined to relinquish.

The appeal alleges error in acceptance of the showing made by the railway company; in holding a contract to convey the equivalent of a sale within intent and meaning of the act of 1898; in not calling for definite records covering this exact tract of land; in not holding that the land was within the disposal of the Government, it not having been patented. In conclusion "contestant claims this land under act of 1898, as amended [act May 17, 1906], and also claims it as a *bona fide* actual settler under terms of the grant, and that the Honorable Commissioner should be reversed in either event."

In support of the appeal Hanley submits the result of a search of title by the Vancouver Title Abstract Company, certified August 4, 1910, that no conveyance appears of record in the record of conveyances of Clarke County, Washington, wherein the land is.

The act of July 1, 1898 (30 Stat., 597, 621), provides that: "It [the railway company] shall not be bound to relinquish lands sold or contracted by it." The act thus contemplates that a sale or contract for a sale obligatory upon the railway company will excuse it from relinquishing the land. The report by the railway company, there being no title of record, or sale contract of record, is not conclusive of Hanley's right. It is a mere statement, not properly evidenced. In view of the Department, Hanley is entitled to take issue upon it, if he desires and to have a hearing whereat he may interrogate and cross-examine witnesses to ascertain with certainty that such a sale has been made and when the sale was made.

The decision of the General Land Office is affirmed, with the modification that if Hanley desire a hearing, within thirty days after notice of this decision, it will be allowed—otherwise, the decision will stand affirmed.

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#### STATE OF WASHINGTON *v.* MACK.

*Decided December 9, 1910.*

#### STATE SELECTION—PREFERENCE RIGHT—SETTLEMENT CLAIM.

Where a State selection proffered during the preference right period accorded the State within which to make selection was held for rejection as to a certain tract for conflict with a homestead entry based upon settlement prior to survey, and while the selection list embracing the tract was still pending the entryman relinquished his entry and filed application for the land under the timber and stone act, the State's selection will be held superior to the timber and stone application, where it is apparent the entryman's settlement and entry were not in good faith to acquire a home but merely for the purpose of defeating the State's preference right of selection and then relinquishing the entry and acquiring title to the land under some other law.

PIERCE, *First Assistant Secretary*:

This is the appeal of the State of Washington from the decision of the Commissioner of the General Land Office, rendered June 4, 1910, holding for cancellation the State's school indemnity selection of the E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 2, T. 25 N., R. 12 W., Seattle, Washington, land district.

The plat of survey of the township in which this land is located was filed July 13, 1905, and on the day following Stephen W. Mack applied to make homestead entry of said tracts based on alleged settlement prior to survey. His entry was allowed and his claim, and a large number of others, became involved in the case entitled *Homestead and Timber Land Claimants v. State of Washington*, which was considered by the General Land Office under date of December 17, 1906, and by the Department, on appeal, September 20, 1907 (36 L. D., 89). By those decisions it was held that the homestead entry of Mack was properly allowed and that the selection of the State in conflict therewith should be rejected, the State's selection having been presented within sixty days after the filing of the plat and after the allowance of Mack's homestead entry.

November 25, 1907, Mack relinquished his homestead entry and applied to enter the land under the timber and stone law, and on February 18, 1908, the local office issued timber and stone cash receipt to him for the tracts formerly embraced by the homestead entry, the issue of certificate being withheld and the proof forwarded to the General Land Office.

June 26, 1908, the Commissioner of the General Land Office returned the State's selection lists, which embraced a large number of tracts, for allowance as to certain tracts to which its claim had been found superior, and in the course of the letter returning the lists it was stated that the claim of Mack to the tracts involved herein was found superior to that of the State in the decisions of December 17, 1906, and September 20, 1907, *supra*; that Mack's entry, however, was relinquished and canceled on the local office records, November 25, 1907; that the said tracts were not of those which had been relinquished by the State, and that when Mack relinquished his homestead entry he waived any claim he might have had to the land by virtue of his alleged settlement of March 1, 1905, and his residence since that time; that the State's claim, duly asserted through its application to select, was pending at the date of filing of the relinquishment; in view of which the subsequent application of Mack to make timber and stone entry was held by the Commissioner to be subject to the right of the State to perfect its application as to said tract by paying the fees within sixty days from notice, in which event it was stated that action would be taken looking to the cancellation of the timber and stone receipt which had been issued to Mack.

October 12, 1908, the State's application was perfected, and following the rule laid down by the Department in the case of *Todd v. State of Washington*, in its decision of August 26, 1909 (38 L. D., 165), the General Land Office, under date of October 4, 1909, held Mack's timber and stone claim for cancellation. A review of that decision was sought, upon which the Commissioner of the General Land Office, basing his action on the Department's subsequent decision of April 1, 1910, in the case of *Todd v. State of Washington* (38 L. D., 518), rendered the decision under consideration, vacating and recalling his previous decision of October 4, 1909, and held the State's list for cancellation.

The State's appeal brings the case before the Department.

In the Department's decision of April 1, 1910, *supra*, rendered upon motion for review and vacating its previous decision of August 26, 1909, in the case of *Todd v. State of Washington*, it was held that by failing to file a motion for review within the time allowed therefor, the State had acquiesced in the action of the Department rejecting its proffered school indemnity selection because of conflict with the homestead entry allowed upon settlement prior to survey, and that the preference-right period accorded the State by the act of March 3, 1893 (27 Stat., 593), within which to make selections, having expired, the State thereafter had no such claim or right by reason of its attempted selection as would prevent other appropriation of the land upon the relinquishment of the conflicting homestead entries.

In that case the homestead entry of one Barkley had been held superior to the State's proffered selection. The Department's decision was promulgated October 11, 1907, and it was not until February 14, 1908, that Barkley relinquished his homestead entry and not until March 19, following, that Todd filed timber and stone application for the tract upon which he subsequently submitted proof. Thus, the time during which the State might have filed a motion for review of the Department's decision of September 20, 1907, had apparently long expired before Barkley relinquished his entry, and, so far as the record shows, there was, presumably, no privity between Barkley and Todd as the former's homestead entry was relinquished February 14, and the latter's timber and stone application was not filed until March 19, following.

It is shown by the State's appeal in this case that notice of the Department's decision of September 20, 1907, was not received by the State until November 6, 1907, and inasmuch as Mack's relinquishment of his homestead entry was filed on November 25, 1907, the time during which the State might have filed a motion for review of the Department's decision had not expired; and, consequently, Mack's timber and stone application was improperly received. More-



over, the timber and stone application was filed by the same party who had previously entered the land under the homestead law and on the same day on which the homestead entry was relinquished. In these particulars, therefore, this case differs materially from the case of *Todd v. State of Washington*.

The record also shows that on November 24, 1906, Mack offered commutation proof on his homestead entry, which was rejected by the register and receiver for the reason that the residence shown was not sufficient to justify acceptance of the proof. Mack filed a motion for review of the register and receiver's decision, supported by affidavit in which he alleged that the United States Commissioner before whom the proof was made did not correctly transcribe the testimony of the claimant and his witnesses; that while the testimony as recorded showed that the entryman had been absent three times, not longer than five months at any one time, the recorded testimony did not show the periods of such absences, and Mack, in his affidavit filed in support of his motion for review, alleged that he made settlement on the land April 1, 1905; that he was advised that he had six months in which to establish an actual *bona fide* residence after the allowance of his entry, and that he had returned to the tract on or about November 20, 1905, after which his residence was continuous, except that during the winter of 1905-1906 he was absent from about January 20, until March 15, or 20, which absence was due to the fact that it was necessary to procure provisions and additional household furniture for his family; that thereafter he was not absent except about two weeks, on business; that his family moved onto the land with him in the spring of 1905 and remained there for about three weeks, or a month, when his wife became sick and refused to stay any longer, and was afterwards, as affiant was informed, continuously under the care of a physician.

Upon the filing of the supplemental affidavit, the register and receiver informed Mack, under date of October 17, 1907, that they had reconsidered the rejection of his proof and had revoked the order of November 26, 1906, by which the proof was rejected, and allowed Mack thirty days within which to appear before some qualified officer with the two witnesses who had testified at the time of making proof, in order that they might corroborate his supplemental affidavit. The period of thirty days appears to have expired and Mack was unable to procure the corroborating evidence, upon which he concluded to abandon his homestead settlement and make entry of the land under the timber and stone law.

It is further shown in the timber and stone proof submitted by Mack, that according to the testimony of his two proof witnesses, the land is not fit for cultivation at the present time because it is

heavily timbered and in a hilly section; while, according to the testimony of Mack, himself, the land is not fit for cultivation and would not be if the timber were removed.

It is urged in the State's appeal that to allow Mack's timber and stone claim for this tract of land is to open the door to fraud; to afford alleged homestead settlers an opportunity to defeat the State's preference right of selection granted by the act of 1893, *supra*, by sham settlement and improvements, colorably maintained merely sufficiently long to justify the Department in rejecting the State's selection proffered during the preference-right period, which action is followed by relinquishment of the so-called homestead claim and the entry of the land under some other law.

There is believed to be much force in the State's contention. The facts in this case seem to show clearly that it was never Mack's purpose to acquire title to this land as a homestead. His residence from the time of alleged settlement in April, 1905, until the submission of final proof in November, 1906, is unsatisfactory. While at the time of making homestead entry he alleged the land was valuable agricultural land, he stated when he submitted proof on his timber and stone entry that the land is chiefly valuable for its timber and would not be fit for cultivation even if it were cleared. He endeavored to acquire title by commuting his homestead entry and when this plan failed he attempted to secure the land under the timber and stone law.

As above stated, the acceptance of Mack's timber and stone application during the period allowed the State within which to file a motion for review of the Department's decision of September 20, 1907, was improper, and in that respect, and in the other particulars hereinbefore noted, this case differs from the case of *Todd v. State of Washington*, and is not controlled by the decision in that case. The Department is of the opinion that the grant made to the State for educational purposes, a highly meritorious grant, should be preserved and protected from those who would by evasion of the law prevent the State from securing valuable lands in satisfaction of its grant. The entire matter has been carefully considered and the Department holds that Mack's timber and stone claim should be canceled and the State's selection approved.

The action of the Commissioner is accordingly reversed.

# RULES OF PRACTICE.

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## I.

### PROCEEDINGS BEFORE REGISTERS AND RECEIVERS.

#### INITIATION OF CONTESTS.

RULE 1. Contests may be initiated by any person *seeking to acquire title to*, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Land Department.

Any protest or application to contest filed by any other person shall be forthwith referred to the Chief of Field Division, who will promptly investigate the same and recommend appropriate action.

#### APPLICATION TO CONTEST.

RULE 2. Any person desiring to institute contest must file, in duplicate, with the register and receiver, application in that behalf, together with statement under oath containing:

(a) Name and residence of each party adversely interested, including the age of each heir of any deceased entryman.

(b) Description and character of the land involved.

(c) Reference, so far as known to the applicant, to any proceedings pending for the acquisition of title to or the use of such lands.

(d) Statement, in ordinary and concise language, of the facts constituting the grounds of contest.

(e) Statement of the law under which applicant intends to acquire title and facts showing that he is qualified to do so.

(f) That the proceeding is not collusive or speculative, but is instituted and will be diligently pursued in good faith.

(g) Application that affiant be allowed to prove said allegations and that the entry, filing, or other claim be canceled.

(h) Address to which papers shall be sent for service on such applicant.

RULE 3. The statements in the application must be corroborated by the affidavit of at least one witness.

RULE. 4. The register and receiver may allow any application to contest without reference thereof to the commissioner; but they must *immediately* forward copy thereof to the Commissioner of the General Land Office, who will promptly cause proper notations to be made upon the records, and no patent or other evidence of title shall issue until and unless the case is closed in favor of the contestee.

#### CONTEST NOTICE.

RULE. 5. The register and receiver shall act promptly upon all applications to contest and, upon the allowance of any such application, shall issue notice, directed to the persons adversely interested, containing:

(a) The names of the parties, description of the land involved, and identification, by appropriate reference, of the proceeding against which the contest is directed.

(b) Notice that unless the adverse party appears and answers the allegation of said contest within 30 days after service of notice the allegations of the contest will be taken as confessed.

(For contents of notice when publication is ordered, see Rule 9.)

#### SERVICE OF NOTICE.

RULE 6. Notice of contest may be served on the adverse party personally or by publication.

RULE 7. Personal service of notice of contest may be made by any person over the age of 18 years, or by registered mail; when served by registered mail, proof thereof must be accompanied by post-office registry return receipt, showing personal delivery to the party to whom the same is directed; when service is made personally, proof thereof shall be by written acknowledgment of the person served, or by affidavit of the person serving the same, showing personal delivery to the party served; except when service is made by publication, copy of the affidavit of contest must be served with such notice.

For the information of those who find it necessary to make service by registered mail, the following regulation of the Post Office Department is printed below:

OFFICE OF THIRD ASS'T P. M. GEN'L,  
Washington, D. C., October 25, 1910.

*To those concerned:*

Sufficient time having elapsed since the issuance of the Postmaster General's Order No. 3276, amending sections 811, 852, and 855 of the Postal Laws and Regulations, providing that return receipts for registered mail shall be furnished only when the sender shall make request therefor by an indorsement upon the article, it is believed that the majority of the patrons of the registry service are now familiar with this requirement. Therefore, that part of the instructions from this office dated July 12, 1910, printed on pages 12 and 13

of the August, 1910, Postal Guide, requiring that "until further notice postal employees accepting mail for registration must in every case if a return receipt is desired," is hereby revoked, *effective December 1, 1910.*

A. M. TRAVERS.

**RULE 8.** Unless notice of contest is personally served and proof thereof made within 30 days after issuance of such notice, or, if service by publication is ordered, unless such publication is commenced within 10 days after such order is made and proof of publication is filed in the local office within 10 days after the last publication, as specified in Rule 10, the contest shall abate.

**SERVING NOTICE BY PUBLICATION.**

**RULE 9.** Notice of contest may be given by publication only when it appears, by affidavit by or on behalf of the contestant, filed within 30 days after the allowance of application to contest and within 10 days after its execution, that the adverse party can not be found, after due diligence and inquiry, made for the purpose of obtaining service of notice of contest within 15 days prior to the presentation of such affidavit, of the postmaster at the place of address of such adverse party appearing on the records of the Land Office, and of the postmaster nearest the land in controversy and also of named persons residing in the vicinity of the land.

Such affidavit must state the last address of the adverse party as ascertained by the person executing the same.

The published notice of contest must give the names of the parties thereto, description of the land involved, identification, by appropriate reference, of the proceeding against which the contest is directed, the substance of the charges contained in the affidavit of contest, and a statement that, upon failure to answer within 20 days after the completion of publication of such notice, the allegations of said affidavit of contest will be taken as confessed.

The affidavit of contest need not be published.

There shall be published with the notice a statement of the dates of publication.

**RULE 10.** Service of notice by publication shall be made by published notice, at least once a week for four successive weeks, in some newspaper published in the county wherein the land in contest lies, or in the newspaper published nearest such land.

Copy of the notice, as published, together with copy of the affidavit of contest, shall be sent by the contestant, within 10 days after the first publication of such notice, by registered mail, directed to the party for service upon whom such publication is being made, at the last address of such party as shown by the records of the Land Office, and also at the address named in the affidavit for publication, and also at the post-office nearest the land.

Copy of the notice, as published, shall be posted in the office of the register, and also in a conspicuous place upon the land involved, such posting to be made within 10 days after the first publication of notice as hereinabove provided.

**RULE 11.** Proof of publication of notice shall be by copy of the notice as published, attached to and made a part of the affidavit of the publisher, or foreman, of the newspaper publishing the same, showing the publication thereof in accordance with these rules.

Proof of posting shall be by affidavit of the person who posted notice on the land, and the certificate of the register as to posting in the local land office.

#### DEFECTIVE SERVICE OF NOTICE.

**RULE 12.** No contest proceeding shall abate because of any defect in the manner of service of notice in any case where copy of the notice or affidavit of contest is shown to have been received by the person to be served; but, in such case, the time to answer may be extended in the discretion of the register and receiver.

#### ANSWER BY CONTESTEE.

**RULE 13.** Within thirty days after personal service of notice and affidavit of contest as above provided, or, if service is made by publication, within *twenty* days after the fourth publication, as prescribed by these rules, the party served must file with the register and receiver answer, under oath, specifically meeting and responding to the allegations of the contest, together with proof of service of a copy thereof upon the contestant by delivery of such copy at the address designated in the application to contest, or personally in the manner provided for the personal service of notice of contest.

Such answer shall contain or be accompanied by the address at which all notices or other papers shall be sent for service upon the party answering.

#### FAILURE TO ANSWER.

**RULE 14.** Upon the failure to serve and file answer as herein provided, the allegations of the contest will be taken as confessed, and the register and receiver will forthwith forward the case, with recommendation thereon, to the General Land Office, and notify the parties by registered mail of the action taken.

#### DATE AND NOTICE OF TRIAL.

**RULE 15.** Upon the filing of answer and proof of service thereof, the register and receiver will forthwith fix time and place for taking testimony, and notify all parties thereof by registered letter mail not less than twenty days in advance of the date fixed.

## PLACE OF SERVICE OF PAPERS.

**RULE 16.** Proof of delivery of papers required to be served upon the contestant at the place designated under clause (h) of Rule 2, in the application to contest, and upon any adverse party at the place designated in the answer, or at such other place as may be designated in writing by the person to be served, shall be sufficient for all purposes; and, where notice of contest has been given by registered mail, and the registry return receipt shows the same to have been received by the adverse party, proof of delivery at the address at which such notice was so received, shall, in the absence of other direction by such adverse party, be sufficient.

Where a party has appeared and is represented by counsel, service of papers upon such counsel shall be sufficient.

## CONTINUANCE.

**RULE 17.** Hearing may be postponed because of absence of a material witness when the party applying for continuance makes affidavit, and it appears to the satisfaction of the officer presiding at such hearing, that—

(a) The matter to which such witness would testify if present is material.

(b) That proper diligence has been exercised to procure his attendance, and that his absence is without procurement or consent of the party on whose behalf continuance is sought.

(c) That affiant believes the attendance of said witness can be had at the time to which continuance is sought.

(d) That the continuance is not sought for mere purposes of delay.

**RULE 18.** One continuance only shall be allowed to either party on account of absence of witnesses, unless the party applying for further continuance shall, at the same time, apply for order to take the testimony of the alleged absent witnesses by deposition.

**RULE 19.** No continuance shall be granted if the opposite party shall admit that the witness, on account of whose absence continuance is desired, would, if present, testify as stated in the application for continuance.

Continuances will be granted on behalf of the United States when the public interest requires the same, without affidavit on the part of the Government.

## DEPOSITIONS AND INTERROGATORIES.

**RULE 20.** Testimony may be taken by deposition when it appears by affidavit that—

(a) The witness resides more than 50 miles, by the usual traveled route, from the place of trial.

(b) The witness resides without, or is about to leave, the State or Territory, or is absent therefrom.

(c) From any cause it is apprehended that the witness may be unable to, or will refuse to, attend the hearing, in which case the deposition will be used only in the event personal attendance of the witness can not be obtained.

RULE 21. The party desiring to take deposition must serve upon the adverse party and file with the register and receiver, affidavit setting forth the name and address of the witness and one or more of the above-named grounds for taking such deposition, and that the testimony sought is material; which affidavit must be accompanied by proposed interrogatories to be propounded to the witness.

RULE 22. The adverse party will, within 10 days after service of affidavit and interrogatories, as provided in the preceding rule, serve and file cross-interrogatories.

RULE 23. After the expiration of 10 days from the service of affidavit for the taking of deposition and direct interrogatories, commission to take the deposition shall be issued by the register and receiver directed to any officer authorized to administer oaths within the county where such deposition is to be taken, which commission shall be accompanied by a copy of all interrogatories filed.

Ten days notice of the time and place of taking such deposition shall be given, by the party in whose behalf such deposition is to be taken, to the adverse party.

RULE 24. The officer before whom such deposition is taken shall cause each interrogatory to be written out, and the answer thereto inserted immediately thereafter, and said deposition, when completed, shall be read over to the witness and by him subscribed and sworn to in the usual manner before the witness is discharged, and said officer will thereupon attach his certificate to said deposition, stating that the same was subscribed and sworn to at the time and place therein mentioned.

RULE 25. The deposition, when completed and certified as aforesaid, together with the commission and interrogatories, must be inclosed in a sealed package, indorsed with the title of the proceeding in which the same is taken, and returned by mail or express to the register and receiver, who will indorse thereon the date of reception thereof, and the time of opening said deposition.

RULE 26. If the officer designated to take the deposition has no official seal, certificate of his official character under seal must accompany the return of the deposition.

RULE 27. Deposition may, by stipulation filed with the register and receiver, be taken before any officer authorized to administer oaths, and either by oral examination or upon written interrogatories.



RULE 28. Testimony may, by order of the register and receiver and after such notice as they may direct, be taken by deposition before a United States commissioner, or other officer authorized to administer oaths near the land in controversy, at a time and place to be designated in a notice of such taking of testimony. The officer before whom such testimony is taken will, at the completion of the taking thereof, cause the same to be certified to, sealed, and transmitted to the register and receiver in the like manner as is provided with reference to depositions.

RULE 29. No charge will be made by the register and receiver for examining testimony taken by deposition.

RULE 30. Officers designated to take testimony will be allowed to charge such fees as are chargeable for similar services in the local courts, the same to be taxed in the same manner as costs are taxed by registers and receivers.

RULE 31. When the officer designated to take deposition can not act at the time fixed for taking the same, such deposition may be taken at the same time and place before any other qualified officer designated for that purpose by the officer named in the commission or by agreement of the parties.

RULE 32. No order for the taking of testimony shall be issued until after the expiration of time allowed for the filing of answer.

#### TRIALS.

RULE 33. The register and receiver and other officers taking testimony may exclude from the trial all witnesses except the one testifying and the parties to the proceeding.

RULE 34. The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved in any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest; to this end said officers should, whenever necessary, personally interrogate and direct the examination of a witness.

RULE 35. In preemption cases the register and receiver will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim; and the exact status of the land at that date as shown upon the records of their office.

RULE 36. In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 37. Due opportunity will be allowed opposing claimants to cross-examine witnesses.

RULE 38. Objections to evidence will be duly noted, but not ruled upon, by the register and receiver, and such objections will be considered by the commissioner. Officers before whom testimony is taken will summarily stop examination which is obviously irrelevant.

RULE 39. At the time set for hearing, or at any time to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing.

When testimony is taken in shorthand the stenographic notes must be transcribed, and the transcription subscribed by the witness and attested by the officer before whom the testimony was taken: *Provided, however,* That when the parties shall, by stipulation, filed with the record, so agree, or when the defendant has failed to appear, or fails to participate in the trial, and the contestant shall in writing so request, such subscription may be dispensed with.

The transcript of testimony shall, in all cases, be accompanied by certificate of the officer or officers before whom the same was taken showing that each witness was duly sworn before testifying, and, by affidavit of the stenographer who took the testimony, that the transcription thereof is correct.

RULE 40. If a defendant demurs to the sufficiency of the evidence, the register and receiver will forthwith rule thereon. If such demurrer is overruled, and the defendant elects to introduce no evidence, no further opportunity will be afforded him to submit proofs.

When testimony is taken before an officer other than the register and receiver, demurrer to the evidence will be received and noted, but no ruling made thereon, and the taking of evidence on behalf of the defendant will be proceeded with; the register and receiver will rule upon such demurrer when the record is submitted for their consideration.

If said demurrer is sustained, the register and receiver will not be required to examine the defendant's testimony. If, however, the demurrer be overruled, all the evidence will be considered and decision rendered thereon.

Upon the completion of the evidence in a contest proceeding, the register and receiver will render joint report and opinion thereon, making full and specific reference to the posting and annotations upon their records.

RULE 41. The register and receiver will, in writing, notify the parties to any proceeding of the conclusion therein, and that fifteen days will be allowed from the receipt of such notice to move for new trial upon the ground of newly discovered evidence, and that if no motion for new trial is made, thirty days will be allowed from the receipt of such notice within which to appeal to the commissioner.

## NEW TRIAL.

RULE 42. The decision of the register and receiver will be vacated and new trial granted only upon the ground of newly discovered evidence, in accordance with the practice applicable to new trials in courts of justice: *Provided, however,* That no such application shall be granted except upon showing that the substantial rights of the applicant have been injuriously affected.

No appeal will be allowed from an order granting new trial, but the register and receiver will proceed at the earliest practicable time to retry the case, and will, so far as possible, use the testimony theretofore taken without reexamination of same witnesses, confining the taking of testimony to the newly discovered evidence.

RULE 43. Notice of motion for new trial, setting forth the grounds thereof, and accompanied by copies of all papers not already on file to be used in support of such motion, shall be served upon the adverse party, and, together with proof of service, filed with the register and receiver not more than fifteen days after notice of decision; the adverse party shall, within ten days after such notice, serve and file affidavits or other papers to be used by him in opposition to such motion.

RULE 44. Motions for new trial will not be considered or decided in the first instance by the commissioner or the Secretary of the Interior, or otherwise than on review of the decision thereof by the register and receiver.

RULE 45. If motion for new trial is not made, or if made and not allowed, the register and receiver will, at the expiration of the time for appeal, promptly forward the same, with the testimony and all papers in the case, to the commissioner, with letter of transmittal, describing the case by its title, nature of the contest, and the land involved.

The local officers will not, after forwarding of decision, as above provided, take further action in the case unless so instructed by the commissioner.

## FINAL PROOF PENDING CONTEST.

RULE 46. Where trial of a contest brought against any entry or filing has taken place, the entryman may submit final proof and complete the same, with the exception of payment of the purchase money or commission, as the case may be; such final proof will be retained in the local office, and, should the entry be adjudged valid, will, if satisfactory, be accepted upon payment of the purchase money or commissions, and final certificate will issue without further action on the part of the entryman, except the furnishing by him, or in case of his death by his legal representatives, of nonalienation affidavit.

In such cases the party making the proof will at the time of submitting same be required to pay the fees for reducing the testimony to writing.

APPEALS TO COMMISSIONER.

**RULE 47.** No appeal from the action or decision of the register and receiver will be considered unless notice thereof is served and filed with the local officers in the manner and within the time specified in these rules.

**RULE 48.** Notice of appeal from the decision of the register and receiver shall be served and filed with such register and receiver within thirty days after receipt of notice of decision: *Provided, however,* That when motion for new trial is presented and denied, notice of such appeal shall be served within fifteen days after receipt of notice of the denial of said motion.

**RULE 49.** No person who has failed to answer the contest affidavit, or, having answered, has failed to appear at the hearing, shall be allowed an appeal from the final action or decision of the register and receiver.

**RULE 50.** Such notice of appeal must be in writing, and set forth in clear, concise language the grounds of the appeal; if such appeal be taken upon the ground of insufficiency of the evidence to justify the decision, the particulars of such insufficiency must be specifically set forth in the notice, and, if error of law is urged as a ground for such appeal, the alleged error must be likewise specified.

Upon failure to serve and file notice of appeal as herein provided the case will be closed.

**RULE 51.** When any party fails to move for a new trial or to appeal from the decision of the register and receiver within the time specified, such decision shall, as to such party, be final and will not be disturbed except in case of—

(a) Fraud or gross irregularity.

(b) Disagreement in the decision between the register and receiver.

No case will be remanded for any defect, which does not materially affect the aggrieved party.

**RULE 52.** All documents received by the local officers must be kept on file and the date of filing noted thereon; no papers will, under any circumstances, be removed from the files or from the custody of the register and receiver, but access to the same, under proper regulations, and so as not to interfere with transaction of public business, will be permitted to the parties or their attorneys.

COSTS AND APPORTIONMENT THEREOF.

**RULE 53.** A contestant claiming preference right of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest; in other cases each party must pay the cost

of taking the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses. The cost of noting motions, objections, and exceptions must be paid by the party on whose behalf the same are made.

**RULE 54.** Accumulation of excessive costs will not be permitted. When the officer before whom testimony is being taken shall rule that a course of examination is irrelevant, the same will not proceed except at the sole cost of the party insisting thereon and upon his depositing the amount reasonably sufficient to pay therefor.

**RULE 55.** Where a party contesting a claim shall by virtue of actual settlement and improvement establish his right of entry of the land in contest under the preemption, homestead, or desert-land laws by virtue of settlement and improvement without reference to the act of May 14, 1880, the costs of contest will be imposed as prescribed in the second clause of Rule 53.

**RULE 56.** The only cost of contest chargeable by registers and receivers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers, directly or indirectly.

**RULE 57.** Registers and receivers may at any time require either party to give security for costs, including expense of taking and transcribing testimony.

**RULE 58.** Upon the filing of the transcript of the testimony in the local office, any excess in the sum deposited as security for costs of transcribing testimony will be returned to the parties depositing the same.

**RULE 59.** When hearings are ordered on behalf of the Government, all costs incurred on its behalf will be paid from the proper appropriation, and when, upon the discovery of reason for suspension in the usual course of examination of entries and contest, hearings are ordered between contending parties, the costs will be paid as required by Rule 53.

**RULE 60.** The costs provided for by the preceding rules will be collected by the receiver when the parties are brought before him in obedience to the order for hearing.

**RULE 61.** The receiver will append to the report in each case a statement of costs, the amount actually paid by each of the parties, and the disposition thereof.

**RULE 62.** All notices and other papers not required to be served by the register and receiver must be prepared and served by the respective parties.

**RULE 63.** The register and receiver will require proper provision to be made for such notices not specifically provided for in these rules as may become necessary in the usual progress of the case to final decision.

## APPEAL FROM DECISION REJECTING APPLICATION TO ENTER PUBLIC LANDS.

RULE 64. To facilitate appeals from the action of local officers relative to applications to file, enter, or locate upon the public lands, the register and receiver will—

(a) Indorse upon every rejected application the date of presentation and reasons for rejection.

(b) Promptly advise the party in interest of their action and of his right of appeal.

(c) Note upon their records a memorandum of the transaction.

RULE 65. The party aggrieved will be allowed 30 days from receipt of notice in which to file notice of appeal in the local land office. The notice of appeal, when filed, will be forwarded to the General Land Office with full report upon the case, which should recite all the facts and proceedings had, and must embrace the following particulars:

(a) The original application, with reasons for the rejection thereof.

(b) Description of the tract involved and statement of its status, as shown by the records of the local office.

(c) Reference to all entries, filings, annotations, memorandum, and correspondence shown by the record relating to said tract and to the proceedings had.

## II.

## PROCEEDINGS BEFORE SURVEYORS GENERAL.

RULE 66. The proceedings in hearings and contests before surveyors general shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

## III.

PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE  
AND SECRETARY OF THE INTERIOR.

## EXAMINATION AND ARGUMENT.

RULE 67. The commissioner will cause notice to be given to each party in interest whose address is known of any order or decision affecting the merits of the case or the regular order of proceedings therein.

RULE 68. No additional evidence will be admitted or considered by the commissioner unless offered under stipulations of the parties *or in support of a mineral application or protest; provided, however, that the commissioner may order further investigation made or evidence submitted upon particular matters to be by him specifically designated.*

Affidavits or other *ex parte* statements filed in the office of the commissioner will not be considered in finally determining any controversy upon the merits.

RULE 69. After receipt of the record by the commissioner thirty days will be allowed to expire before any action is taken thereon, unless, in the judgment of the commissioner, public policy or private necessity shall require summary action, in which event he will proceed at his discretion, first notifying the attorneys of record of his intention so to do; provided, that where no appeal has been filed the case may be immediately considered and disposed of.

RULE 70. If brief is not filed before a case is reached in its order for examination, the argument will be considered closed, and no further argument or motion of any kind will be entertained, except upon application and upon good cause appearing to the commissioner therefor.

RULE 71. In the discretion of the commissioner, oral argument may be presented, at a time to be fixed by him and upon notice to opposing counsel, which notice shall specify the time for such argument and the specific matter to be discussed. Except as herein provided, oral hearings or suggestions will not be allowed.

#### REHEARINGS.

RULE 72. No motion for rehearing of any decision rendered by the Commissioner of the General Land Office will be allowed.

#### MOTIONS.

RULE 73. No motion shall be entertained or considered in any case after the record has been transmitted to a reviewing officer.

In *ex parte* cases, where the entryman has been allowed by the commissioner to furnish additional evidence or to show cause, or, in the alternative, to appeal, both the evidence or showing and the appeal are filed, the commissioner shall pass upon the evidence or showing submitted, and, if found sufficient, note the appeal as closed. If such evidence or showing be found insufficient, the appeal will be forwarded to the Secretary as in other cases.

#### APPEAL FROM THE COMMISSIONER TO THE SECRETARY.

RULE 74. Except as herein otherwise provided, an appeal may be taken to the Secretary of the Interior from the final decision of the commissioner in any proceeding relating to the disposal of the public lands and private claims.

RULE 75. No appeal shall be had from the action of the commissioner affirming the decision of the local officers in any case where the party adversely affected shall have failed to appeal from the decision of said local officers.

RULE 76. Notice of appeal from the commissioner's decision must be served upon the adverse party and filed in the office of the register and receiver or in the General Land Office within thirty days from the date of service of notice of such decision.

RULE 77. When the commissioner considers an appeal defective he will notify the party thereof; and if the defect be not cured within 15 days from the date of receipt of such notice, the appeal may be dismissed and the case closed.

RULE 78. In proceedings before the commissioner in which he shall decide that a party has no right to appeal to the secretary, such party may apply to the secretary for an order directing the commissioner to certify said proceedings to the secretary and suspend action until the secretary shall pass upon the same; such application shall be in writing, under oath, and fully and specifically set forth the grounds upon which the same is made.

RULE 79. When the commissioner shall decide against the right of appeal he will suspend action on the case for 20 days from service of notice of such decision to enable the party against whom the decision is rendered to apply to the secretary for an order certifying the record as hereinabove provided.

RULE 80. The appellant will be allowed 20 days after service of notice of appeal within which to serve and file brief and specification of error; as provided by rule 50, the adverse party 20 days after service of such within which to serve and file reply thereto; appellant will be allowed 10 days after service of such reply within which to serve and file response: *Provided, however,* That if either party is not represented by counsel having offices in the city of Washington, 10 days in addition to each period above specified will be allowed within which to serve and file the respective briefs.

No arguments otherwise than above provided shall be made or filed without permission of the secretary or commissioner granted upon notice to the adverse party.

RULE 81. Examination of cases will be facilitated by filing arguments in printed form.

#### ORAL ARGUMENT BEFORE THE SECRETARY.

RULE 82. Oral argument of any case on appeal to the Secretary of the Interior will be allowed, in the discretion of the secretary, at a time fixed by him and upon written notice to the adverse party.

#### REHEARING OF SECRETARY'S DECISION.

RULE 83. Motion for rehearing of the decision of the secretary must, together with evidence of service thereof and all papers used in connection therewith, be in writing and filed in the General Land Office or in the local land office, for transmittal through the General



Land Office to the secretary, within 30 days after service of notice of such decision. A motion so filed will act as a supersedeas until further action is taken by the secretary.

Such motion must state concisely and specifically the grounds upon which such rehearing is asked and must be accompanied by argument in support thereof. No matters other than those specified will be considered.

The adverse party will be allowed 15 days in which to serve and file reply to the motion for rehearing; and immediately upon the expiration of the periods allowed herein, the Commissioner of the General Land Office shall transmit the entire record to the secretary, who will consider the same as early as practicable.

#### MOTIONS FOR REVIEW AND REREVIEW.

**RULE 84.** Motions for review and rereview are hereby abolished.

#### SUPERVISORY POWER OF SECRETARY.

**RULE 85.** Motion for the exercise of supervisory power will be considered only when accompanied by positive showing of extraordinary emergency or exigency demanding the exercise of such authority.

In proceedings before the Secretary of the Interior the same rules shall govern, in so far as applicable, as are provided for proceedings before the Commissioner of the General Land Office.

**RULE 86.** No rule here prescribed shall be construed to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law.

#### ATTORNEYS.

**RULE 87.** Every attorney before practicing before the Department of the Interior must first file the oath prescribed by section 3478 of the Revised Statutes.

**RULE 88.** In all cases where any party is represented by attorney such attorney will be recognized as fully controlling the same on behalf of his client, and service of any notice or other paper relating to such proceedings upon such attorney will be deemed notice to the party in interest.

Where a party is represented by more than one attorney service of notice or other papers upon one of said attorneys shall be sufficient.

**RULE 89.** No person hereafter appearing as a party or attorney in any case shall be entitled to notice of any proceeding therein who does not, at the time of appearance, file in the office in which the case is pending a statement showing his name and post-office address and the name and post-office address of the party whom he represents.

**RULE 90.** Any attorney in good standing employed, and whose appearance is regularly entered in any case pending before the department, will be allowed full opportunity to consult the records

therein, together with abstracts, field notes, tract books, and correspondence which is not deemed privileged and confidential.

RULE 91. Verbal or other inquiries by parties or counsel directed to any employee of the department, except the commissioner, assistant commissioner, or chief of division of the General Land Office, or the Secretary and Assistant Secretary, the Assistant Attorney General, or the first assistant attorney in the offices of the Secretary of the Interior, or with the consent of one or more of said officers, is expressly forbidden.

RULE 92. Abuse of the privilege of examining records of the department or violation of the foregoing rule by any attorney will be treated as sufficient cause for institution of disbarment proceedings.

#### SERVICE OF NOTICES.

RULE 94. Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notice or other papers by mail from the General Land Office, except in case of notice of resident attorneys, in which case one day will be allowed.

In computing time for service of papers under these rules of practice the first day shall be excluded and the last day included; provided, however, that where the last day falls on Sunday or a legal holiday, such time shall include the next following business day.

RULE 95. Notice of all motions and proceedings before the commissioner or Secretary shall be served upon parties or counsel personally or by registered mail, and no motion will be entertained except on proof of service of notice thereof.

RULE 96. Ex parte proceedings and proceedings in which the adverse party does not appear will, as to notice of decision, time for appeal, and filing of exceptions and arguments, be governed by the rules prescribed in other cases, so far as the same are applicable. In such cases the commissioner or Secretary may, pursuant to application and upon good cause being shown therefor, permit additional evidence to be presented for the purpose of curing defects in the proofs of record.

#### INTERVENTION.

RULE 97. No person shall be allowed to intervene in any case except upon application therefor, under oath, showing his interest therein.

These Rules of Practice will be effective on and after February 1, 1911.

FRED DENNETT,

*Commissioner of the General Land Office.*

Approved: December 9, 1910.

R. A. BALLINGER,

*Secretary.*

## OPINION.

## FOREST RESERVES—LANDS WITHDRAWN FROM ENTRY.

Lands temporarily withdrawn from entry for further examination with a view to their inclusion in a definite forest reservation constitute "temporary forest reserves" within the meaning of section 1 of the act of June 11, 1906.

L. C. Howell, 39 L. D., 92, in effect overruled.

*Acting Attorney-General Fowler to the Secretary of the Interior,  
September 20, 1910.*

Under date of August 19, 1910, you apprised me of a lack of unanimity between your department and the Department of Agriculture regarding the proper construction of the first section of the act of June 11, 1906 (34 Stat., 233), and requested my opinion on the subject. The section, so far as here material, is as follows:

That the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of lands within permanent or temporary forest reserves . . . which are chiefly valuable for agriculture and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves and which are not needed for public purposes, and may list and describe the same by metes and bounds or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this act.

Specifically, as appears by your statement, the case involves an application by one L. C. Howell to enter, under this law, certain lands in California which as long ago as December 13, 1904, were temporarily withdrawn for further examination, with a view to their inclusion, wholly or in part, within a forest reserve, and which, though never so included, have not since been restored to entry under the public land laws in general. In a communication of July 13, 1910, addressed to the Secretary of Agriculture, you held, in effect, that lands so withdrawn are not subject to entry under the statute, even though they be chiefly valuable for agriculture, and even though the conditions and requirements of the statute be otherwise met. The Secretary of Agriculture, on the other hand, in correspondence submitted with your letter, maintains that such lands constitute a "temporary forest reserve" within the meaning of this law.

Plainly, in devising the legislation, Congress sought a way whereby small tracts of agricultural land, unavoidably included within large bodies set aside for forest purposes, might be settled and acquired by home seekers without subtracting from forested areas or interfering with sound forest management. I do not find that the section in any way adds to, restricts, or modifies the forest reserve policy as previously expressed. It simply recognizes the fact that, in the process

of creating the reservations, certain agricultural lands are perforce included which should be open to the homesteader, and to obviate this defect supplies a new legal mechanism whereby they may be definitely segregated from all lands that are properly required for the forest, and then entered under the homestead law by metes and bounds without regard to the lines of the public surveys. Though fully protective of the forest policy, the act is in this respect a settlement law.

Bearing this purpose clearly in mind, in connection with the practice of withdrawing large areas tentatively (as was done in this case) in the genesis of national forests, I do not encounter grave difficulty in applying the section to the lands in question, regardless of any technical or academic criticism that may be invited by the expression "temporary forest reserves." In framing this law Congress evidently had in mind two classes of lands reserved or held for forestry purposes, which should be brought within its operation—one comprised in "permanent" reserves, the other in "temporary" reserves. As to the former, I see no reason to doubt that there were intended those definite and ultimate reservations, commonly called "forest reserves," and now designated by law as "national forests," which have been created in some few instances by direct act of Congress, but in most instances by proclamation of the President, and are subjected by law to the administrative care and control of the Secretary of Agriculture.

A legislative definition of their objects may be found in the following words of Congress:

No public forest reservation shall be established except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. [See act of June 4, 1897, 30 Stat., 11, p. 35.]

This provision, with others *in pari materia*, might well be invoked as indicative of a desire upon the part of Congress to have reservations established as permanent instrumentalities to meet continuing necessities. There is certainly nothing in the legislation on the subject to evince an opposite intention. And while I know of no reason why the President, should he see fit to do so, might not lawfully create such a reservation to subserve a purpose merely and professedly temporary, my attention has not been directed to any instance in which the terms of the proclamation might not fairly be said to import an indefinite and therefore, presumably, a permanent duration. Out of these considerations I think it follows clearly

enough that the term "permanent forest reserves" in the act of 1906 was intended to apply to the national forests, both because the application is quite appropriate and because there is and has been no other species of forest reserves to which the term could possibly be referred.

From this conclusion it necessarily results that the expression "temporary forest reserves" can not mean the national forests. It might be argued that Congress sought to anticipate a mere possibility, not presaged by experience, that the President might, at some time, create reservations for definite terms or to meet transitory needs; but this would be a strained interpretation and really an invasion of the duty to give this statute and all its parts a reasonable construction in the light of conditions as they existed when it was enacted and the mischief which it was intended to cure.

It is certainly much more reasonable to suppose that Congress had in mind the extensive withdrawals of land made from time to time as preliminaries to the creation of definite forest reservations by executive proclamation. Such withdrawals, though made by your department, in the ultimate analysis are justified by and rest upon the power vested in the President to create forest reservations. They are presumed to be made by his direction or with his assent, and, in the eye of the law, they are regarded as his acts. (See *Wilcox v. McConnell*, 13 Pet., 498, 513; *Wolsey v. Chapman*, 101 U. S., 755, 769; *Wood v. Beach*, 156 U. S., 548, 550.) Where lands have been withdrawn for a definite purpose, I see no impropriety in saying that they are "reserved" for that purpose or in speaking of them as constituting a "reservation" for that purpose. So, the withdrawn lands referred to in your letter may be properly designated as a "reservation," since they are set aside and reserved from sale or other disposition until their availability for forest purposes shall have been determined. This reservation is also temporary, because it is intended, sooner or later, to be brought to an end, either by including the lands in another reservation, of very different legal incidents, or by restoring them to entry. To refer to it as a "forest reservation" is not particularly fortunate, in view of the previous occupation of that term by another legal and common meaning. But this is an example of inaccuracy rather than obscurity.

The conclusion that such withdrawn lands constitute the "temporary forest reserves" intended by the act is unavoidable when it is considered, first, that if they do not, the appellation must stand without a meaning, and, second, that such intention is in perfect accord with the obvious purpose of the statute. Withdrawals of this kind may remain in effect (as did the one here involved) for many years before the lands become embodied in a forest or are restored to entry; and the areas affected being designated in some haste, and with a view to further examination in the future, are

even more likely to include agricultural tracts than are the forests themselves. The aim of the statute was to prevent such tracts from being needlessly withheld from homestead entry, and from this standpoint it is, of course, entirely immaterial whether the lands were merely withdrawn or definitely included in a forest reservation. The remedy provided by the statute is equally suggested by both situations, and applicable to each alike, permitting the entryman to have, by metes and bounds, the irregular agricultural parcels, while retaining for the Government the lands desirable for forest uses—a separation which in many instances could not be accomplished by the restoration and subsequent entry of the lands by legal subdivisions.

I may add that the foregoing views appear to accord with those expressed by the committee which reported this measure to the Senate. (Senate Report No. 3291, first session Fifty-ninth Congress.)

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#### OPINION.

##### FOREST RESERVES—LANDS WITHDRAWN FROM ENTRY.

The principle announced in the opinion of Acting Attorney-General Fowler (28 Op. A. G., 424; 39 L. D., 411), that lands withdrawn from entry with a view to their inclusion in a national forest constitute a "temporary forest reserve" within the meaning of the act of June 11, 1906, concurred in.

*Attorney-General Wickersham to the Secretary of the Interior, December 10, 1910.*

I have given careful consideration to the several suggestions made in your letter of October 6, 1910 (B 13521 OL), wherein you request a reconsideration of the opinion of the Acting Attorney General rendered to you September 20, 1910. The opinion holds that lands withdrawn from entry with a view to their inclusion in a national forest constitute a "temporary forest reserve" within the meaning of the act of June 11, 1906 (34 Stat., 233). Your suggestions, briefly summarized, are:

First. That the opinion ignores a class of reservations created by proclamation of the President which more nearly fit the term "temporary forest reserves" than do the lands that have merely been withdrawn from entry, viz, forest reserves "comprehending lands devoid of timber and intended to be (and which were) used for experimental purposes, in the planting of trees, etc."

Second. That the opinion affects the jurisdiction of your department, as heretofore understood and exercised, over such withdrawn lands and therein may operate seriously upon private interests which rest upon the validity of your acts; and

Third. That to extend the right of entry by metes and bounds to lands merely withdrawn, and which may likely be restored to the public domain, offends the general policy of allowing entries of public lands only in rectangular tracts and tends to inconvenience and confusion.

The first suggestion, if well grounded, would be strongly persuasive, but it is hardly borne out by the proclamations themselves. A careful examination of all proclamations creating or affecting forest reservations, from the first of them down to a time long subsequent to the act in question, reveals no instance in which the purpose of the reservation was expressed to be temporary, or may safely be inferred to have been so from the recitals, description of subject-matter, or general context of the proclamation. In this respect the proclamations are so substantially similar that one can not logically be distinguished from another. The proclamation instanced by you (35 Stat., 2120) recites that the lands restored were no longer required "for experimental forest purposes." The original proclamation (34 Stat., 3178) which created the reservation thus abolished is couched in the terms common to scores of others and affords no indication that its purpose differed from the purpose actuating the creation of forest reservations in general. The recitals are, first, a recital of the authority of the President to set aside forest reserves under section 24 of the act of March 3, 1891 (26 Stat., 1103), and, second, the following:

And whereas, the public lands in the Territory of New Mexico, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation.

I take the explanatory recital of the later proclamation to mean that the land was originally set apart for the conduct of forestry experiments of a more or less general character, or with a view to the forestation or reforestation of that particular tract. From neither of these objects may it be inferred that the subsequent restoration was part of the original plan.

Of the other suggestions contained in your letter, that which concerns the respective jurisdictions of your department and the Department of Agriculture and the protection of private interests is, of course, important; but I do not believe that the opinion logically points to the results which you apprehend. Because lands merely withdrawn are regarded as temporary forest reserves for the special and limited purpose of the act of June 11, 1906, it by no means follows that they must be regarded as forest reserves for all purposes. The very existence of the distinction between the temporary and the permanent reserves—the distinction upon which depends the attribution of any meaning to the words "temporary forest reserves" in the act—rests in the fact that the former have not yet attained

the status of lands definitely set apart to be used and administered as national forests. They may never reach that status. The jurisdiction conferred upon the Secretary of Agriculture by the act of February 1, 1905 (33 Stat., 628), cited by you, is essentially a jurisdiction to care for, supervise, and manage the national forests as distinct instrumentalities of the Government—as “going concerns”—and to execute certain laws relating to them. He is directed by that act to “execute, or cause to be executed, all laws affecting public lands heretofore or hereafter reserved under the provisions of section 24 of the act approved March 3, 1891, and acts supplemental to and amendatory thereof, *after such lands have been so reserved*,” excepting certain classes of laws left for execution by the Interior Department. The language here used distinctly imports that the process of reserving a given area of land shall have been completed before the Secretary’s functions shall come into play.

The laws which the Secretary is to execute are manifestly the laws which declare the general policy respecting forest reservations and govern their administration and use as such apart from the general mass of public lands. The object of the “temporary” reservation is to retain the lands withdrawn in *statu quo* until the President may inquire further whether they are lands suitable to be brought within the operation of those laws. Application of those laws before the inquiry has been ended and acted upon would not only defeat in part the presidential purpose, but would be inconsistent with the laws themselves, since they presuppose as a condition to their application to a given area of land that a definite and final decision of the President to set apart and reserve it for forestry purposes shall have been made and proclaimed. The duty and responsibility of creating forest reserves rests with the President. The preliminary withdrawal of lands through your action is but a step in the process of creating them. The withdrawn areas can not be said to come under the “supervision” of the Secretary of Agriculture or his department within the meaning of the act of February 15, 1901 (31 Stat., 790), until they shall have been definitely devoted by the President to the forest policy. The power which brings about such withdrawals may, of course, revoke them.

The foregoing observations appear to cover the various objections made in your letter save that which is based upon the inconvenience of allowing entries to be made otherwise than in accordance with the public surveys. This is an objection the ground for which may be in large measure removed in practice by cooperation between the two departments; but whether this be so or not it is an objection which goes rather to the wisdom of the act of June 11, 1906, than to the soundness of the Acting Attorney General’s opinion.



## WILLIAM E. MOSES.

*Decided December 12, 1910.*

WARE SCRIP—LOCATABLE ONLY ON SURVEYED LAND.

Ware scrip may be located only upon surveyed land.

PIERCE, *First Assistant Secretary*:

The General Land Office, by decision of March 4, 1910, held for cancellation location made by William E. Moses January 28, 1910, with Ware scrip of unsurveyed land described as the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 19, T. 11 N., R. 37 E., Tucumcari, New Mexico. Moses appealed from that decision.

This scrip was issued under authority of the act of Congress of December 28, 1876 (19 Stat., 500), which provided:

That the Commissioner of the General Land Office be, and he is hereby, required to issue a certificate of new location to the legal representatives of Samuel Ware, authorizing them to locate said certificate on six hundred and forty acres of any land in what was Missouri Territory, subject to sale.

The location was canceled for the reason that said scrip can not be located upon unsurveyed lands.

The purpose of the act of December 28, 1876, authorizing the issuance of said scrip to the legal representatives of Samuel Ware, was to reinstate in said representatives all the right Ware had acquired under the New Madrid certificate of location issued under the act of February 17, 1815 (3 Stat., 211), and hence it can only be located on lands that are subject to location with New Madrid certificates.

Certificates issued under the act of February 17, 1815, had been located upon unsurveyed lands, but the General Land Office refused to recognize the validity of such location, acting upon the advice of the Attorney-General that their location upon unsurveyed lands is unauthorized, as they can only be located upon lands the sale of which is authorized by law, and "a sale is not authorized by law until the section lines are run."

However, the act of April 26, 1822 (3 Stat., 668), cured that defect by confirming all locations of New Madrid certificates theretofore made "as if they had conformed to the sectional and quarter-sectional lines of the public surveys." But it also provided:

That hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional or quarter-sectional lines of the public surveys as nearly as the respective quantities of the warrants will admit.

The Supreme Court, in *Barry v. Gamble* (3 How., 32-52), construing the act of April 26, 1822, said that "after the passing of the act (26th April, 1822) no location of a New Madrid claim should be permitted that did not conform to the sectional and quarter-sectional lines."

The decision of the General Land Office, so far as it holds that unsurveyed lands are not subject to location with Ware scrip, is affirmed.

JONES *v.* BURCH.

*Decided December 12, 1910.*

HOMESTEAD ENTRY—QUALIFICATION—OWNERSHIP OF LAND.

Where at the time of making homestead entry the entryman was disqualified by reason of being the proprietor of more than 160 acres of land, but acted in good faith, believing himself qualified, and prior to the intervention of any adverse right or proceeding against the entry the disqualification is removed, the entry may be permitted to stand and considered effective from the date he became qualified.

SECOND CONTEST—SAME CHARGE AS FIRST.

A contest charging disqualification of an entryman having been dismissed after full disclosure of the facts upon which the charge was based, hearing will not be ordered upon a second contest making the same charge.

INSUFFICIENT FIVE-YEAR PROOF—COMMUTATION PROOF.

Final five-year proof upon a homestead entry, found insufficient, may be accepted as commutation proof, upon proper payment, if a sufficient period of residence, substantially continuous, be shown next preceding the submission of the proof, provided the entryman was during such period a qualified homesteader.

PIERCE, *First Assistant Secretary:*

March 16, 1903, Ira J. Burch made homestead entry for the SW.  $\frac{1}{4}$ , Sec. 14, T. 4 N., R. 16 E., Woodward, Oklahoma, land district.

April 18, 1907, Alex. Barnes filed contest affidavit charging that Burch was the owner of 480 acres of land in Beaver County, Oklahoma, at the time he made entry; that his homestead affidavit was false and his entry fraudulent as he was not a qualified entryman. After due hearing on the contest the local officers recommended dismissal of the contest. That action was affirmed by the Commissioner, October 9, 1908, for the reason that the contestant did not file appeal within the required time. The case was also considered on its merits and a decision favorable to the entryman was reached on the law and facts of the case. A petition was filed with the Department to require the Commissioner to transmit contestant's appeal and for consideration of the case. Said petition was denied by the Department June 5, 1909, without passing upon the questions of law involved, the denial being based upon the failure of contestant to appeal within proper time.

In the record in the above case it appeared that the entryman consummated a purchase of 480 acres of land after the date of the execution of his homestead application papers before an officer other than the register or receiver of the local land office, but before the date when the papers were received in the local office, they having

been delayed in transmission. Before the date of contest he had disposed of the said land. In their decision in said case the local officers stated:

Technically, we think the defendant Burch was not a qualified entryman at the time this entry was made. We think, however, that the defendant Burch at the time he made this entry believed himself to be a qualified entryman, and he did not intentionally commit any fraud against the United States in acquiring this entry. . . . The defendant having not intentionally made this entry when he was disqualified, and having in good faith become a qualified entryman before the contest was initiated, we think his entry became a valid entry, and we therefore recommend that this contest be and the same is hereby dismissed.

While the Department did not express any opinion on the law involved in the Barnes contest because the contestant was in default in failing to appeal within time, yet the holding of the local officers above quoted meets the approval of the Department. This is in harmony with similar cases where an alien or a minor makes entry but becomes qualified prior to any proceedings initiated against it, such entry is allowed to stand. See case of James F. Bright (6 L. D., 602), and Vidal *v.* Bennis (22 L. D., 124).

December 14, 1907, G. C. Jones also filed affidavit of contest against the said entry of Burch, making substantially the same charge contained in the contest of Barnes.

November 8, 1909, Burch gave notice of intention to submit final five-year proof before a United States Commissioner on December 30, 1909. December 29, 1909, Jones filed protest, styled by him an amended contest affidavit, repeating the charges theretofore made as to Burch's disqualification and further alleging that Burch had given notice of intention to submit final five-year proof and that said entryman had not resided upon, cultivated and improved said land as required by law, and such residence and cultivation as had been made were wholly insufficient to constitute a compliance with the law and permit of said proof, and further stating that the entryman had not established a *bona fide* residence on the land prior to the spring of 1907, and that his residence prior to that time was a mere pretense, his actual home being on a place known as the Buffalo Ranch.

Notice was issued upon the amended affidavit, setting the case for hearing on February 15, 1910. Burch offered proof on the day advertised and an attorney for Jones appeared and cross-examined the proof witnesses. The proof testimony shows that Burch did not establish an actual home on the land until February, 1907, and that he had since resided thereon continuously with his family and had placed substantial improvements thereon. The cross-examination was confined mainly to the question of Burch's alleged disqualification to make entry.

January 11, 1910, motion was made in behalf of Burch asking that if the proof made by him be considered insufficient for five-year proof, the same be accepted as commutation proof and that he be allowed to make cash payment. Motion was also made that the protest be dismissed on the ground that the issues sought to be raised had already been decided in the case of Barnes *v.* Burch. January 29, 1910, the local officers vacated the order for a hearing and dismissed the protest and the contest of Jones for the reason that the same question as to qualification of Burch has been decided in the aforesaid contest and that the defaults as to residence were alleged to have occurred long prior to the initiation of the contest on that ground and the default had been cured.

By decision of July 22, 1910, the Commissioner affirmed the aforesaid action of the local officers and directed that the proof of Burch be accepted as commutation proof upon proper payment.

The question as to entryman's qualifications having been the subject of controversy in the aforesaid case of Barnes *v.* Burch, and a full and satisfactory hearing having been had therein, the Department is unwilling to now order a hearing in the present contest upon the same charge. Final decision was rendered in the prior contest favorable to the entryman after disclosure of the facts. The further charge now made that *bona fide* residence was not established until in the spring of 1907 cannot be entertained because the default was cured long prior to the charge.

No objection is seen to the order directing acceptance of the proof offered, as commutation proof, upon the entryman's making proper payment, as he appears to have complied with law for a sufficient period after he became qualified. The decision appealed from is accordingly affirmed.

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CLYDE H. JOHNSON.

*Decided December 13, 1910.*

AMENDMENT OF ENTRY UNDER KINKAID ACT.

Where an entryman under the Kinkaid act at the time of making application to enter gave notice of his intention to embrace other adjoining land by amendment as soon as the record could be cleared of an existing entry covering the same, the fact that such adjoining land became subject to entry as the result of the contest of another, and not of the entryman himself, is no reason for denying his application to embrace the same by amendment.

PIERCE, *First Assistant Secretary:*

Clyde H. Johnson has appealed to the Department from the decision of the Commissioner of the General Land Office of August 8,

1910, denying his application filed December 10, 1909, to amend his homestead entry number 13208 (Alliance 07131), made March 2, 1908, for the SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 4, E.  $\frac{1}{2}$ ; SE.  $\frac{1}{4}$ , Sec. 5, and NW.  $\frac{1}{4}$ , Sec. 9, T. 25 N., R. 45 W., containing 440 acres, Alliance, Nebraska, land district, so as to embrace in addition thereto lot 4, Sec. 4, T. 25 N., R. 45 W., and the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 33, T. 26 N., R. 45 W., containing 118.89 acres, same land district.

It appears from the record that at the time Johnson made his original entry he stated his intention to include therein by amendment the land he now seeks to obtain, the same being then included in homestead entry number 6161, made July 13, 1903, by Alice M. Conant, and at that time stated to be under contest by applicant Johnson. Said homestead entry number 6161 was canceled by Commissioner's letter "H" October 6, 1908, as result of the contest of one William E. Lawrence, but the date of service of notice of such cancellation is not shown.

It appearing from the record that Johnson gave notice of desire to embrace the land he now seeks in his entry by amendment as soon as the same became subject to entry, and he being the first applicant therefor after same became subject to entry under his application to amend, it is thought that such amendment should be allowed. The fact that said land became subject to entry as the result of a contest other than his own is not sufficient reason for the denial of his application for the land, which substantially as now applied for should in effect be considered as forming a part of his original claim. See unreported decision in case of *ex parte* Lynn Fox (Alliance 07020) of date November 30, 1910.

The decision appealed from is reversed.

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ASSIGNMENT OF RECLAMATION ENTRIES—ACT JUNE 23, 1910.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., December 17, 1910.

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

PROJECT ENGINEERS,  
*United States Reclamation Service.*

SIRS: The circular entitled "Instructions under reclamation acts of June 11, 23, and 25, 1910 (36 Stat., 465, 592, 835, 864), relative to entry, assignment, leave of absence, etc.," approved September 13, 1910 (39 L. D., 202), is hereby amended by substituting for that por-

tion of the circular relating to the act of June 23, 1910, *supra*, the following:

The act approved June 23, 1910, entitled "An act providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead act" (Public, No. 243; 36 Stat., 592), reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: Provided, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.*

Under the provisions of this act persons who have made or may make homestead entries subject to the reclamation act may assign their entries in their entirety at any time after filing in this office satisfactory proof of residence, improvements, and cultivation for the five years required by the ordinary provisions of the homestead law. The act also provides for the assignment of homestead entries in part, but such assignments, if made prior to the establishment of farm units, must be made in strict accordance with the legal subdivisions of the public survey, and if made after such units are established must conform thereto, except as hereinafter provided.

In cases where the entry involves two or more farm units, the entryman may file an election as to which farm unit he will retain, and he may assign and transfer to a qualified assignee any farm unit or farm units entirely embraced within the original entry. If an election by the entryman to conform to a farm unit be filed and no assignment made of the remainder of the entry, the entry will be conformed to the farm unit selected for retention and canceled as to the remainder. Assignments of parts of established farm units will be allowed only after report by the project engineer to the Department that the farm unit as proposed to be divided or as capable of adjustment in connection with surrounding lands will make two or more units each capable of supporting a family, the report to be accompanied with plats describing the amended farm units. Such plats will be submitted by the Director of the Reclamation Service to the Secretary of the Interior for approval, and, when approved by

him, will be forwarded to the Commissioner of the General Land Office for transmission to the local land office with appropriate instructions; the assignment of the lands embraced within one of the farm units so established to be allowed only after a proper showing of the qualifications of the assignee, the filing of water right application by him and the payment of any amounts due upon the lands covered by the assignment under the terms of the public notices issued in connection with the project in which the lands are situated.

If a survey shall be found necessary to determine the boundaries of the subdivision of any such farm unit, or the division of the irrigable area, a deposit equal to the estimated cost of such survey must be made with the special fiscal agent, Reclamation Service, on the project, by or on behalf of the parties concerned. Any excess over the actual cost will be returned to the depositor or depositors after the completion of the survey.

No assignment of a portion of any farm unit will be recognized by the Department as modifying any approved water right application, or releasing any part of the farm unit as originally established from any portion of the charges announced against it until after the approval of the amended farm unit by the Secretary of the Interior, the filing of evidence of the qualifications of the assignee, the receipt of a proper water right application and of the payments due upon the land included in the assignment.

Assignments under this act must be made expressly subject to the limitations, charges, terms, and conditions of the reclamation act, and inasmuch as that act limits the right of entry to one farm unit, the assignee must present a showing in the form of an affidavit, duly corroborated, that he has not acquired title to, and is not claiming any other farm unit or entry under the reclamation act.

Assignments made and filed in your office in accordance with these regulations must be noted on your records and forwarded to the General Land Office for consideration and, if approved, the assignees in each case will be required to make payment of the water right charges and submit proof of reclamation as would the original entryman and, after proof of full compliance with the law, may receive a patent for the land.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary of the Interior.*

## SANTA FE PACIFIC RY. CO.

*Decided December 19, 1910.*

## PRIVATE LAND CLAIM—RAILROAD GRANT.

Lands within the primary limits of the grant to the Atlantic and Pacific, now Santa Fe Pacific, Railway Company, by the act of July 27, 1866, and also within the claimed limits of the Laguna Pueblo private land grant, being *sub judice* at the date of the grant to the railway company, are by force of the act of July 22, 1854, excepted from the operation of that grant.

United States v. McLaughlin, 127 U. S., 428, distinguished.

PIERCE, *First Assistant Secretary*:

This is the appeal of the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office, date July 5, 1910, holding that certain lands within twenty miles of the road were excepted from the grant by reason of the private land claim known as the Laguna Pueblo grant.

By the act of July 22, 1854 (10 Stat., 308), the surveyor-general of the Territory of New Mexico was required to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico and to make full report on all such claims as originated before cession of the Territory to the United States by the treaty of Guadalupe Hidalgo (9 Stat., 922), and in regard to all pueblos existing in the Territory, showing the extent and locality of each. The act further provided that the report of the surveyor-general should be laid before Congress for such action as might be deemed just and proper thereon, with a view to confirming *bona fide* grants and to give full effect to the treaty of 1848 between the United States and Mexico, "and until the final action of Congress on such claims all land covered thereby shall be reserved from sale or other disposal by the government and shall not be subject to the donations granted by the previous sections of this act."

It appears that this claim was brought to the attention of the surveyor-general of New Mexico by John S. Watts, attorney for the pueblo, April 18, 1872, the boundaries of the claim being described as follows:

On the north to the agua fria spring and that spring is called Paguaste, and to the east to Sierrita Colorado towards the rising sun and the little table land of Piedras de Amolar, and that toward the west they have to the Canada Ancha, which empties toward the north when it rains and on the south to a water which is under a rock.

The claim was recommended for confirmation by the surveyor-general, November 12, 1872, and it was confirmed, with reduced boundaries, by the Court of Private Land Claims, April 20, 1898. The survey of the claim as confirmed by the court was approved



September 7, 1899, and as thus located is entirely within the primary limits of the grant to the Atlantic and Pacific, now the Santa Fe Pacific, Railway Company, by the act of July 27, 1866 (14 Stat., 292). The lands involved are opposite that portion of the company's road on definite location of March 12, 1872.

The Commissioner of the General Land Office held that the case was controlled by the decision of the Supreme Court in the case of *United States v. McLaughlin* (127 U. S., 428), while the railway company claims that the decision relied upon is authority for a contrary ruling and for that reason asks that the action of the General Land Office be reversed.

The case of *United States v. McLaughlin*, *supra*, involved a Mexican grant in the State of California, and, considering the different kinds of grants made by the Government of Mexico, the court divided them into three kinds:

(1) Grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less; (2) grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name, where the donee is entitled to the whole tract according to the boundaries given, or if not given, according to its extent as shown by previous possession.

In that case the court found that the grant was of the second class, namely, a quantity grant of a given area within a very much larger tract described by exterior boundaries, and the court accordingly held that the grantee was entitled only to the quantity granted and that if within the exterior boundaries lands were disposed of by the government, sufficient not being disposed of to satisfy the grant in the event of its location, such disposition of surplus lands was valid, and that consequently a grant of that nature, which was afterwards held to be bad, did not defeat the grant to a railroad company.

In the case under consideration, however, the grant does not appear to be of the second class described by the Supreme Court, in that it is shown to have been a grant by specific boundaries, and while it is true that the Court of Private Land Claims did not confirm the grant to the extent of the entire quantity claimed, there is nothing whatever to show that the grant was one of specific area within exterior boundaries embracing a much larger tract than that granted. The surveyor-general of New Mexico, who has custody of the records of the Court of Private Land Claims, was directed by the Department to forward the record of the court in this case, and it is seen from an examination of the court's opinion that it was claimed before the court that an original grant was made to the pueblo; that the people of the pueblo have been in open and notorious possession and occupancy of the land for nearly three hundred years. After com-

menting upon the condition of the pueblo about the time the grant was alleged to have been made, and considering its population, character of land, etc., the court used this language:

We know, also, that the village is situated in what is practically a desert and that but small patches of land in the vicinity are capable of cultivation. It is therefore certain that the quantity of land above specified [839 varas] was entirely inadequate for the needs of the people. There is a presumption, therefore, that additional lands were given them, for the very conditions are shown to have existed which, under the cedula, imposed upon the viceroy the duty of giving additional lands; but that presumption does not enable us to determine the amount or quantity to be given.

The court, while holding that the evidence was not sufficient to warrant the confirmation of the grant to the extent claimed, nevertheless granted the confirmation to the extent of four square leagues.

It will thus be seen that this case is not controlled by the court's decision in *United States v. McLaughlin*, *supra*, because here the claim was one of specific boundaries, and it is immaterial whether the claim was subsequently confirmed to the extent of the full quantity claimed or not, because it was *sub judice* at the time of the grant to the railroad company and the lands claimed were therefore reserved by force of the act of 1854.

The decision of the Commissioner of the General Land Office was correct and must be affirmed.

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THOMAS B. WALKER.

*Decided December 22, 1910.*

#### INVESTIGATION BY LAND DEPARTMENT.

The land department has the power to fully investigate any application for title to public land, and an order by the Commissioner directing such investigation is ordinarily not appealable, and copy thereof should not be furnished to counsel for applicant.

#### FOREST LIEU SELECTION—VALIDITY OF BASE.

Where land assigned as base for a forest lieu selection was secured from the State by use of an application and purchased in the name of a fictitious person, the various instruments effecting the transfer of title from the State to the ultimate owner of the base land resting upon forged and fictitious papers, a selection based thereon must be canceled, whether the selector or subsequent grantee of the base land had knowledge of the fraud or not.

#### FOREST LIEU SELECTION—VALIDITY OF BASE.

Where the base land was acquired by means of an application and purchase by a real person, but not in his own interest but for the use and benefit of the party acquiring the title to the base land, in violation of the laws of the State regulating the sale of its lands, a selection based thereon should likewise be canceled, where the patentee of the State or his grantee does not occupy the position of a *bona fide* purchaser for value; otherwise it should be patented.

## DELAY IN ADJUDICATION OF CLAIM—INVESTIGATION.

While long delay in the adjudication of claims under the public land laws should be avoided, it is more important that the land department be fully satisfied of the entire legality of the transaction, and an investigation ordered by the Commissioner for that purpose will not be interfered with by the Secretary.

PIERCE, *First Assistant Secretary*:

December 8, 1910, the Commissioner of the General Land Office transmitted an appeal entitled "Special Appeal" from the order of his office, dated December 2, 1910, to Chief of Field Division Dezenendorf, directing him to investigate further the matter of forest reserve lieu selection, No. 5603, made July 19, 1902, at Sacramento, California, by Thomas B. Walker, for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 24, SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 23, and E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 26, T. 29 N., R. 8 E., M. D. M. in lieu of S.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 16, T. 8 S., R. 31 E., M. D. M., California.

This matter has previously been before the Department, which, upon July 6, 1910 (39 L. D., 64), denied a petition for a writ of certiorari. The Commissioner had, upon May 13, 1910, directed the issuance of charges upon report of a special agent, stating its effect to be that the base land was illegally obtained from the State of California; that the selection was fraudulent in this that the application, made to the State under section 3495 of the Political Code of California, in the name of Edward J. Clark, was made in the interest and for the use and benefit of Thomas B. Walker; that the affidavit made by Clark that he desired to purchase the base land for his own use and benefit and for the use and benefit of no other person or persons whatever, as required by said section, was false and that, in view of such false statement, the applicant's right to purchase the land or to receive any evidence of title was defeated.

It now appears that the above charges, as prepared by the Commissioner, went beyond the scope of the agent's report, which in effect stated that the records of the State land office at Sacramento, California, show that, on February 14, 1899, Edward J. Clark, of 607 Buchanan Street, San Francisco, California, made application to the State of California for the base land; that certificate of purchase, No. 14,714, issued to him December 16, 1899; that on October 8, 1900, said certificate was assigned to Thomas B. Walker, to whom patent No. 10,242 issued October 26, 1900, and that said patent was sent to John A. Benson. The report was accompanied by an affidavit of said Edward J. Clark in which he states that in 1899 he made application to purchase school lands from the State of California; that he made application at the suggestion of Jack Herr; that, to the best of his recollection, the description of the land was not in the

application when he signed it; that he did not swear to the application before any notary public; that he did not pay any money on account of the purchase price of the land and no money was paid to him for signing the papers; that he never received any money for the sale of said land and that when he signed the application he did not expect to receive the land or to derive any benefit therefrom, and that he heard Herr was getting money for securing signatures to applications for lands. The purpose of the reinvestigation ordered is to ascertain whether Thomas B. Walker had knowledge of or in any wise participated in the fraud perpetrated upon the State of California and procured said application to be filed in his interest to the end that he might use the land in exchange for government land. It may here be added that the abstract of title shows that the patent issued to Walker by the State of California and Walker's deed of conveyance to the United States were both recorded December 10, 1900, at the request of John A. Benson.

The power of the land department to fully investigate any application for title to public lands is undoubted, and an order by the Commissioner directing such investigation is ordinarily not appealable, and a copy of such order should not be furnished to counsel for applicant. However, the Commissioner stated that there are several hundred similar cases pending in his office, and that he desires a decision as a guide for his action therein, and the Department will on that account take jurisdiction of the matter.

In his denial of the charges as issued by the Commissioner, the selector stated that at the time of making this selection he was the owner of a large amount of land within the district in which the selected land is situated; that near such land was a considerable quantity of land belonging to the United States, which he was desirous of purchasing, to be used and held by him in connection with the lands already owned, and that for that purpose he went into open market to purchase land within a forest reserve for the purpose of exchanging it for the above tracts of public lands; that during the years 1900, 1901 and 1902 he purchased what was commonly called "forest reserve scrip" from various brokers, among whom was John A. Benson, through whom he purchased the base involved in the present selection; that at the time of such purchase an abstract of title was furnished him showing that the certificate of purchase had issued to Clark by the State of California and that upon due assignment of this certificate to him he received patent from the State. He further denies any knowledge on his part of the fraud, if any, committed in connection with Clark's application to purchase from the State.

The complications arising out of the alleged fraudulent acquisition of land from the State of California later used as base for forest lieu

selections have been the subject of decisions both by the Department and the courts. The frauds appear to have been of two classes:

(1) Where the base land was secured by the use of applications and purchased in the names of fictitious persons, the various instruments effecting the transfer of title from the State to the ultimate owner of the base land resting upon forged and fictitious instruments.

(2) Where the base land was acquired by means of applications and purchases made by real persons but not in their own interest but for the use and benefit of the party acquiring title to the base land, in violation of the laws of California regulating the sale of its lands.

In the unreported case of George A. Keeline, assignee of Duncan McNee, decided June 1, 1910, the Department declined to interfere with a hearing ordered by the Commissioner, upon the charge that the base land was fraudulently acquired from the State of California by means of an application made by one Bell in the interest of McNee, to whom the base land was patented by the State and who selected the land in lieu thereof, which was later assigned to Keeline. It was there stated that:

The validity of a selection does not depend upon whether the United States has acquired a good title to the base land which it can successfully defend as a bona fide purchaser, but whether the selection was made in good faith and not by fraudulent practices and in pursuance of fraudulent design.

This holding was again made in the case of E. Howard Thompson (unreported), June 28, 1910. In that of Hiram M. Hamilton (39 L. D., 76), the facts were somewhat different. There the application for purchase of the base land was made by one Harvey W. Snow, and it was charged that he permitted the use of his name in applications to purchase lands from the State and had probably signed forty or fifty applications; that many applications were signed at the request of his brother H. H. Snow, others at the request of F. W. Lake; that the purchaser Harvey W. Snow was paid small sums of money at different times for the use of his name and that at no time was he an applicant for land for his own use. The certificate of purchase was issued to Snow February 10, 1900, the land having been conveyed January 29, 1900, to Hiram M. Hamilton, the lieu selector, to whom state patent issued January 19, 1901. The Commissioner, in directing notice of charges to issue, also stated that the selector Hiram M. Hamilton had knowledge of all of the above facts although the agent making the report made no such assertion. The Department accordingly held that:

It is not proper to hold one chargeable with fraud when there is no report or charge against him that he in any way participated or connived or had any knowledge of it. Your decision is reversed, and, if no other reason appeared than stated in the special agent's report, you will adjudicate Hamilton's selection upon its merits, regardless of any fraud that Snow may have committed.

This language was directed to the fact that the Commissioner charged a knowledge of the fraud on the part of Hamilton when there was no basis for such charge in the agent's report and was not designed to prohibit a further investigation if such should be found to be necessary in order to ascertain whether or not Hamilton had such knowledge as a matter of fact.

In the case of the *United States v. Hyde et al.* (174 Fed. Rep., 175), the base land was purchased from the State of California by one Schlipf in the interest of F. A. Hyde to whom the State patent was issued, and Hyde thereupon conveyed it to F. A. Hyde & Company, a corporation of which Hyde owned nine hundred and ninety-six of its one thousand shares of stock. The corporation thereafter conveyed it to the United States, and one Angus McDougal was given power of attorney by the corporation to select the lieu land and convey the land so selected. McDougal made selection and conveyed the selected land, by deed, to Messrs. Truxbury & Sawyer, June 4, 1901, it appearing that they had no knowledge of the fraud practised upon the State of California. The selection was approved by the General Land Office June 24, 1902, and patented July 29, 1902. In a suit to set aside the patent issued by the United States, the court held that the fraud was sufficient to warrant the setting aside of the patent to the lieu land in the absence of a *bona fide* purchaser for value, although it was not clear under what conditions that relief would be granted, but that Messrs. Truxbury & Sawyer were the *bona fide* purchasers, for value.

In *Hyde v. Shine* (199 U. S., 62) the Supreme Court considered an indictment charging a conspiracy which embraced—

certain false practises by the defendants, whereby school lands were to be obtained fraudulently from the States of California and Oregon by Hyde and Benson (1) in the names of fictitious persons, and (2) in the names of persons not qualified to purchase the same, whereby the said Hyde and Benson were to cause and require such school lands to be relinquished by means of false and forged relinquishments, assignments and conveyances to the United States, in exchange for public lands to be selected and for titles thereto by patents to be obtained by and on behalf of the said Hyde and Benson.

At page 82 the court said:

By the act of June 4, 1897, 30 Stat., 36, it is provided that any case in which a tract is covered by an unperfected *bona fide* claim, or by a patent, is included within the limits of a public forest reservation, the *settler* or *owner* thereof may, if he desires to do so, relinquish the tract to the Government, etc. The privilege of the act is therefore reserved to a settler or owner, and as there is no claim that Hyde was a settler upon the lands, it only remains to consider whether he was an "owner" within the act. Although the word owner has a variety of meanings and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, it implies something more than a bare legal title, and we know of no authority for saying that a person in possession of land under a void deed can be regarded

as the owner thereof. Ownership may not imply a perfect title, but it implies something more than the possession of land under a title which is void; and when the Government holds out to owners of lands an inducement to relinquish such lands in exchange for others, it implies that the persons with whom it is dealing, if not the owners in fee simple, are at least *bona fide* owners, with authority to dispose of and vest a good title thereto. We are clear that the defendant does not fall within this category and that the United States may justly claim to have been defrauded out of the land patented to him.

\* \* \* \* \*

The indictment under section 5440 charges a conspiracy to defraud the United States out of the possession, use of and title thereto of divers large tracts of public lands, and if the title to these lands were obtained by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the state lands by setting up the rights of a *bona fide* purchaser. Under the circumstances it cannot be doubted that the United States might maintain a bill to cancel the patents to the exchanged lands procured by these fraudulent means, notwithstanding its title to the forest reserve lands might be good.

From the above statements of the decisions of the Department and the courts it can not be doubted that, where, as in the first class of cases, the base lands are patented by the State to a fictitious grantee, the selection based thereon must be canceled, whether the selector or subsequent grantee of the base land had knowledge of the fraud or not, as the United States could in no event secure a good title to the base land. In the second class of cases, if the patentee of the State or his grantee does not occupy the position of a *bona fide* purchaser for value, the selection should also be canceled, otherwise it should be patented.

Counsel for appellant states that the selector does not enter his present objection to the proposed action because of any apprehension as to the results of the investigation but that, in view of the long delay during which the Government has enjoyed dominion over the base land, he feels that there is no good reason for further delay. Of course the Government does not assert any dominion over the base land prior to the approval of the selection and, while long delay in the adjudication of claims under the public land laws should be avoided, still it is more important that the Commissioner be thoroughly satisfied of the entire legality of the transaction and an investigation ordered by him for that purpose will not be interfered with by the Department.

It should be noted that the special agent did not report what the relations, if any, were between Herr and Benson, and the exact nature of the agreement between Walker and Benson whereby Walker secured the base land does not appear.

The decision of the Commissioner is accordingly affirmed and the investigation will proceed upon the lines above indicated.

CHARLES C. CONRAD.

*Decided December 23, 1910.*

## HOMESTEAD APPLICATION—RECLAMATION WITHDRAWAL.

A homestead entry of land within a reclamation project, allowed subsequently to the act of June 25, 1910, upon an application in all respects regular filed prior to that act, and upon which action was delayed only because of pressure of business in the local office, is not in violation of the provisions of section 5 of said act.

PIERCE, *First Assistant Secretary*:

March 5, 1910, Charles C. Conrad filed in the local land office at Great Falls, Montana, his homestead application to enter the NE.  $\frac{1}{4}$ , Sec. 18, T. 23 N., R. 4 E., M. M., subject to the provisions of the act of June 17, 1902 (32 Stat., 388), the land having been withdrawn under the second form October 17, 1903. His application was accompanied by payment of the required fee, and as appears from the record, due to unusual pressure of business before the local land office, the formal assignment of number to the application and otherwise recording of the entry was not possible until August 9, 1910.

By the decision of the Commissioner of the General Land Office dated December 1, 1910, Conrad's entry was held for cancellation as having been allowed in violation of the provisions of section 5 of the act of June 25, 1910 (36 Stat., 835), the same having been treated as made on August 9, 1910, when the formal allowance was noted upon the public records.

No formal appeal from said decision has as yet reached the Department, but its consideration of the matter is earnestly requested by a letter from attorney for Conrad, in which, in addition to setting forth the merits of Conrad's claim, it is stated that there are a great many people, probably about 500, similarly circumstanced, and as it is learned informally that a large number of entries have been held for cancellation for like reason, consideration has been given to the matter without awaiting the receipt of a formal appeal.

By the 5th section of the act of June 25, 1910, *supra*, it is provided:

That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same.

Prior to the passage of this act, and, indeed, in accord with the language of the act of June 17, 1902, *supra*, the irrigable lands within a reclamation project remained subject to homestead entry, notwithstanding their withdrawal under said act, the entry, of course, being subject to the limitations, conditions, and provisions the act.



Under these circumstances it is the opinion of this Department that Conrad's entry was in fact made when he filed his application, accompanied by the required showing, including the fees, the land being then subject to his application; that his rights should in nowise be prejudiced by the inability of the local officers to formally allow the same for five months thereafter, and that as a consequence his entry was not made in violation of the provisions of section 5 of the act of June 25, 1910. If no other objection appear, therefore, his entry should be permitted to stand, and like action should be taken on all similar applications, and where any of the same have been held for cancellation, such orders should be revoked without awaiting the formal filing of appeal and transmission of the papers to the Department.

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**BELKNAP *v.* MULHOLLAND.**

*Decided December 27, 1910.*

**CONTEST OF TIMBER AND STONE ENTRY—REAPPRAISEMENT.**

The allowance of an application to contest a timber and stone entry is within the discretion of the Commissioner of the General Land Office, and not a matter of right granted by law; and where the applicant seeks to contest such an entry on the ground of underappraisement of the land, the Commissioner may, in his discretion, reject the application and direct a reappraisement.

**PIERCE, *First Assistant Secretary:***

October 7, 1909, Homer G. Mulholland made entry for the NW.  $\frac{1}{4}$ , Sec. 26, T. 15 S., R. 8 W., W. M., Roseburg, Oregon, land district, under the timber and stone act and regulations of November 30, 1908 (37 L. D., 289).

December 27, 1909, the local officers transmitted the contest affidavit by L. E. Belknap against the said entry in which he alleged that the appraised price was much less than the real value of the timber on the land and asked to be allowed to contest the entry at his own expense. The Commissioner, by decision of May 5, 1910, dismissed the contest for the reason that the purchase was made by the entryman after the appraisement under the departmental regulations. He, however, directed that reappraisement of the land be made.

It appears that under said order a new appraisement of the land has been made and the entryman has been afforded opportunity to complete his claim by making proper payment. The new appraisement places the value of the land and timber at more than four times the price fixed by the first appraisement.

Belknap has appealed from the action of the Commissioner in rejecting his application to contest. It can not be said that the rejection of this offer to contest is a denial of a right granted by law. A timber entry under the timber and stone act is not one of the class specified in the act of May 14, 1880 (21 Stat., 140), which awards preference right of entry in certain cases and under the conditions stated. It is true that the Department has under its practice and in its discretion permitted contests of timber and stone entries. Provision was made in the regulations of November 30, 1908, for the allowance of contests of entries made under said regulations. But it was not intended thereby to grant an absolute right to prosecute a contest if such be deemed improper or inadvisable. It has always been held by the Department that the allowance of contest, especially as against a final entry, lies within the sound discretion of the Commissioner, subject only to supervision and control by the Secretary of the Interior. See cases of *Meyers v. Massey* (22 L. D., 159), and *John N. Dickerson* (35 L. D., 67).

Section 35 of the said regulations reads as follows:

The Commissioner of the General Land Office may at any time direct the reappraisement of any tract or tracts of public lands, when, in his opinion, the conditions warrant such action.

The Commissioner in the exercise of his discretion rejected the application to contest and ordered reappraisement of the land. His action is affirmed.

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CLARA F. MORAN.

*Decided December 29, 1910.*

REPAYMENT—EXCESS—DEVILS LAKE LANDS.

Lands in the Devils Lake Indian reservation, opened to entry under the act of April 27, 1904, at \$4.50 per acre, which at the date of the proclamation of June 8, 1907, reducing the price of the remainder of said lands then unreserved and undisposed of to \$2.50 per acre, were embraced in an Indian allotment of record, or were in a state of reservation by virtue of the act of April 23, 1904, reserving lands for a period of sixty days after cancellation of an allotment covering the same, did not fall within the purview of the proclamation; and a subsequent entryman of the land was properly required to pay at the original rate of \$4.50 per acre, and is not entitled to repayment of the difference between the two rates as excess.

PIERCE, *First Assistant Secretary*:

Clara F. Moran has appealed from the decision of the Commissioner of the General Land Office of November 21, 1910, denying her application for repayment of alleged excess of money paid by her on her homestead entry made April 25, 1909, for the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 11, T. 151 N., R. 63 W., Devils Lake, North Dakota,

land district. She was required to pay at the rate of \$4.50 per acre and claims she should have been charged only \$2.50 per acre.

These lands were a part of Devils Lake Indian Reservation opened by the act of April 27, 1904 (33 Stat., 322), and President's proclamation of June 2, 1904 (33 Stat., 2368), the price being fixed at \$4.50 per acre. These tracts were formerly embraced, with other lands, in Indian allotment No. 1096 of Kasto, upon which trust patent issued June 11, 1898. Said allotment, with a number of others, was found to be illegal, and the Commissioner of Indian Affairs, under date of May 24, 1907, recommended that same be canceled and the land reserved for opportunity of allotment to other Indians. This recommendation was approved by the Secretary on May 27, 1907. By letter of July 25, 1907, the Commissioner of the General Land Office directed the local land office to note cancellation of the Kasto allotment and others therein designated, and that the lands not allotted would be open to entry under the laws applicable thereto after the expiration of sixty days. The sixty days' reservation was doubtless in view of the act of April 23, 1904 (33 Stat., 297), which specifically reserves such lands from entry for sixty days after the cancellation of an erroneous patent on an Indian allotment.

As above stated the said act fixed the price of the lands to be entered in said reservation at \$4.50 per acre up to and until provision may be made for the disposition of said land by proclamation of the President and provided that in case an entry be canceled the land should be subject to reentry at the same price until and unless different provision be made by the President in accordance with the act, and it was provided:

That when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated in his discretion, sell from time to time the remaining lands subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all interests concerned.

In accordance with said act the President, on June 8, 1907 (35 Stat., 2143), issued proclamation reducing the minimum price for the remaining lands unreserved and undisposed of to \$2.50 per acre.

The Commissioner in rejecting the present application based his action principally upon the ground that it was not the intention of said proclamation to reduce the price of lands which were not shown to be small in acreage or hilly and stony as these were the reasons assigned in the said proclamation for the reduction of price, and therefore that these tracts did not appear to come within the terms and intent of the proclamation.

The Department concurs in the rejection of the application for repayment in this case but for reasons other than those assigned by the Commissioner.

Said proclamation of June 8, 1907, is in part as follows:

Whereas, it appears that such tracts of said lands now remaining undisposed of are small in acreage or hilly and stony and cannot be disposed of at the price named:

Now Therefore, I, Theodore Roosevelt, President of the United States \* \* \* do hereby declare and make known that such of said lands as are unreserved and undisposed of on and after the date hereof be subject to disposition under the general provisions of the homestead, townsite laws and of Section 2455 of the Revised Statutes, as amended by act of Congress approved June 27, 1906 (34 Stat., 517), at a price of not less than \$2.50 per acre.

These tracts were not affected by the said proclamation because at that date they were reserved lands. They had never been subject to entry at the price of \$4.50 per acre, the price primarily fixed by law and which was to remain until, in the judgment of the President, no more could be disposed of at that price, when he was authorized to change the terms and manner of disposal of such remaining lands. He could direct disposal under the homestead law or otherwise, at such price and in such manner as he might deem best, and he was not restricted to one proclamation but might change the terms of sale by other later proclamations if found to be advisable. Under the terms of the proclamation issued only such lands as were unreserved and undisposed of on that date were affected thereby and reduced in minimum price to \$2.50 per acre. It has been held by the Department that lands embraced in an entry at the time the proclamation was issued were not affected by the proclamation notwithstanding later cancellation of the entry, but that the price remained at \$4.50 per acre. See cases of Otto A. Kayser and William H. Meyer, decided by the Department October 31, 1908, unreported.

It follows that the application for repayment must be denied. Accordingly the decision appealed from is affirmed.

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**LANDS IN NATIONAL FORESTS—NOTICE OF INTENTION TO MAKE FINAL PROOF.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., December 31, 1910.*

**REGISTERS AND RECEIVERS,**

*United States Land Offices.*

SIRS: By paragraph 5 circular of April 24, 1907 (35 L. D., 682), you were advised as follows:

In all cases of application to make final proof, final entry, or to purchase public lands under any public land law, the register and receiver will at once

forward a copy thereof to the Chiefs of Field Division of Special Agents. Such copy will be endorsed "coal lands" or "not coal lands," as the case may be. Where the land is in a National Forest or other reservation a second copy will be forwarded to the officer in charge thereof.

I now have to advise you that, hereafter, in complying with the above instructions, when the land is in a National Forest, you will furnish said notices to the proper forest officers in *triplicate*. In mineral applications for patent request the claimant to furnish a sufficient number of the published notices to supply the need hereunder.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER, *Secretary.*

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ALFRED M. STUMP ET AL.

*Decided January 5, 1911.*

SILETZ HOMESTEAD ENTRIES—PROTEST—CONFIRMATION.

The protest of Special Agent Hobbs, in his letter of November 11, 1903, challenging the validity of certain homestead entries in the former Siletz Indian reservation, being within two years after the issuance of final certificates upon such entries, takes the entries out of the operation of the proviso to section 7 of the act of March 3, 1891.

PIERCE, *First Assistant Secretary:*

This is an appeal taken by the Grand Rapids Timber Company, transferee, from a decision of the Commissioner of the General Land Office, rendered July 26, 1909, sustaining the action of local officers and holding for cancellation homestead entry, No. 14410, made July 21, 1902, by Alfred M. Stump, for the SW.  $\frac{1}{4}$ , Sec. 26, T. 8 S., R. 9 W., W. M., Portland, Oregon, land district.

Said land was formerly embraced within the Siletz Indian Reservation, and at the date of filing the application the entryman filed also an affidavit, alleging settlement upon the tract March 1, 1901, and continuous residence thereon from that date. Commutation proof was submitted November 10, 1902, and commutation cash certificate, No. 7754, was issued to claimant on the same day.

The appeal involves not only the merits of the controversy but the effect of the confirmatory provision of section 7 of the act of March 3, 1891 (26 Stat., 1099).

As to the merits there can not be a particle of doubt that the concurring decisions below are absolutely correct. The evidence shows not even a fair pretense of cultivation; improvements too trivial to

suggest any intention of making the entered land his home, only a quarter of an acre cleared and no cultivation except the planting of a few fruit trees; and as to residence, out of the 425 days required by law the entryman himself confessed at the hearing before the local officers that at the outside he had spent no more than 95 days in residence. Furthermore, within three months from the time he proffered commutation proof, the record discloses that he sold his interest to one Morley, the transferee's immediate predecessor in title. The transferee, who appeared by counsel (and president of the corporation himself was a witness), takes the position that the hearing before the local officers was the outcome of proceedings instituted more than two years after the issuance of the final certificate and final receipt.

Fully to understand this issue it is necessary to consider the situation in the Siletz district from the winter of 1903, when certain reports were made to the Secretary of the Interior inviting his attention to alleged frauds in the acquirement of land therein under the homestead law. These reports resulted, March 12, 1903, in the transmission of that information by the Secretary of the Interior to the Commissioner of the General Land Office, suggesting that he take such action in the premises as he might find the facts to require. On March 25, 1903, the Commissioner issued and caused to be delivered to the proper officers of the Land Office an order as follows:

The Secretary of the Interior has referred to this office for such action as may be necessary to protect the interests of the Government, a copy of certain correspondence had by the Department, from which it appears that a majority of the commuted homestead entries of lands in the former Siletz Indian Reservation, including Tps. 6, 7, 8, 9 and 10 South of Ranges 9, 10 and 11 West, in the Oregon City, Oregon, land district, are made fraudulently for speculative purposes, without *bona fide* residence or improvements.

You are instructed, therefore, to suspend action on such entries until they can be investigated by a special agent.

The following day, March 26, 1903, George W. Patterson, a special agent of the General Land Office, stationed at Oregon City, Oregon, was instructed as follows by the Commissioner:

The Secretary of the Interior has referred to this office copy of correspondence had by the Department with Mr. Warren H. Brown, Agency Clerk at the Yakima Indian Agency, Fort Simcoe, Washington, relative to fraudulent homestead entries in Washington and Oregon. In one letter Mr. Brown says:

My personal observation of these matters was in connection with the old Siletz Indian Reservation in Lincoln County, Oregon. It is the practice there (in the majority of cases) for the entryman to visit the land before filing, then to visit it once, sleeping one night upon it, every six months, then return to his former work and home, to return to the land in another six months. Very rarely does the family or any member of it save the father come to the land; their household effects are not brought, and on completion of the title they never see the place again, nor do anything to improve it.

The fact that most of the lands in the former Siletz Indian Reservation are not suitable for agricultural purposes indicates that there is considerable truth in Mr. Brown's statement, and that the entries in question are made solely for speculative purposes, without compliance with the law requiring residence and cultivation. The Secretary directs that immediate attention be given to this matter, and that proper action be taken to prevent the alleged frauds.

You are instructed, therefore, to investigate, and make report upon, all homestead entries in Ts. 6, 7, 8, 9 and 10 S., of R. 9, 10 and 11 W., included in the former Siletz Indian Reservation. You will take up first those on which final proof has already been made under the commutation clause of the homestead law, and will submit reports thereon on form 4-480, using special care to make complete and definite answers to the interrogatories numbered 10, 11 and 12. You will keep informed, through the local office, as to when final proofs are to be made on any of the unperfected homestead entries, and will endeavor to be present when such proofs are submitted, to cross examine the parties as to their compliance with the law.

You will not mention Mr. Brown's name as the informant in this matter.

Mr. Patterson made no report and on August 7, 1903, the Commissioner directed one A. J. Hobbs, special agent, to carry out the instructions given Mr. Patterson.

On October 14, 1903, the Commissioner wrote the following letter to Mr. Hobbs:

In your letter of August 19, 1903, referring to office instructions of August 7, 1903, directing the investigation of homestead entries in the former Siletz Indian Reservation, you say that you have visited the lands included in fourteen of said entries and that these lands are heavily timbered, unfit for agricultural purposes, and almost inaccessible; that the lands are now occupied and no improvements have been placed on any of them except an unsubstantial cabin. You say also that practically the same conditions exist with reference to all the rest of said entries and that for you to make a personal examination of each tract will require the services of a guide and surveyor and other assistants for probably nine months. You say that, by calling upon the claimants and other persons having knowledge of the facts with regard to the entries, you can secure all necessary information relative thereto and ask whether, in view of the circumstances, it will be necessary for you to make a personal examination of the lands.

You will make as thorough an investigation as possible of these cases without making a personal investigation of each tract. You will secure the affidavits of the parties and will require each of them to make a complete showing as to the exact length of time he spent upon his claim, the improvements placed upon it, the purpose for which he entered it, and all the relevant facts relating to the entry. Affidavits should also be secured if possible, from any other persons who may have knowledge of the facts.

Upon receipt of your reports upon these entries the office will determine whether a personal examination of the land is necessary.

You will take up this matter without unnecessary delay.

On November 4, 1903, Hobbs sent a telegram to the Commissioner, in words and figures following:

Please cause the further issuance of patents to lands in the original Siletz Indian Reservation stopped. These proofs on cash entries are practically all fraudulent.

He followed this telegram with a letter, dated November 11, 1903. The letter is as follows:

Referring to your letter "P" of October 14, 1903, relative to the investigation of homestead entries in the former "Siletz Indian Reservation;" I have the honor to report that upon investigation I find that the following list of homestead entries were made at or practically on the same date, and that said entries have all been deeded to Howard Morley, following is the list of entries made in townships eight and nine south, range nine west, that have been thus conveyed to said Howard Morley to wit:

Hd. No. and date.	Entryman.	Tp. & Range.	C. E. C. No. & date.
* * * 14410 July 21, 1902..... * * *	* * * Alfred M. Stump..... * * *	* * * 8 S. 9 W..... * * *	* * * * * 7754 Nov. 10, 1902. * * * * *

The foregoing entrymen have all deeded their respective homesteads to Howard Morley at the date, and for the consideration, as follows, to-wit:

Name of Entryman	Name of Transferee	Date of Deed	Cons.
* * * Alfred M. Stump..... * * *	* * * Howard Morley..... * * *	* * * Feb. 12, 1903..... * * *	* * * \$2000.00 * * *

It will be seen that seventeen of the foregoing entries were made on the same date viz. July 21, 1902, in the same township and range and in the same locality. That the remaining four entries of the list herein, were made for lands in the near locality of these other entries, and that the entire twenty one entries, were sold at or near the date of the cash entry certificates. In view of this fact, it is reasonable to believe that these entries were not made in good faith by the entrymen for the purpose of making homes thereon, and as these lands are all in a district that is heavily timbered, it seems evident that the purpose is to acquire these timber lands in the interest of one transferee, under cover of the homestead law. I suggest that no patents be issued for any of the lands embraced in the foregoing entries, pending a further examination and report, relative to the same.

On November 14, 1903, in consequence of the information above noted, the Acting Commissioner of the General Land Office issued and caused to be delivered to the proper officers of the Land Office the following letter:

Referring to instructions of Division "C" of March 25, 1903, directing the suspension of action on all commuted homestead entries in the former Siletz Indian Reservation, including Ts. 6, 7, 8, 9, 10 and 11 W., in the Oregon City, Oregon, land district, please note the suspension of all entries on said lands until further orders.

This action is based on telegram from Special Agent Hobbs, November 4, 1903, 185613, File 20466, "P."

It thus appears that practically one year after Stump had tendered his proof and had received his certificate a special agent of the General Land Office protested that entry and that all proceedings



thereunder leading to the issue of a patent were promptly suspended by the proper officer.

This fact is mentioned in a letter addressed to the register and receiver of the local land office by the Commissioner of the General Land Office under date of June 18, 1908, wherein he denied the privilege to one J. B. Curry of instituting a contest against the entry. In this letter he said:

November 11, 1903, said entry was protested by a special agent, and by letter "P" of September 14, 1907, action was taken against the entry upon the adverse report of a special agent dated October 8, 1906, and a hearing upon such charges was set for May 8, 1908 . . . In view of the fact that the charges made by the special agent are stronger than those made by Curry and as a hearing has probably already been had in the case, the said contest application is denied, subject to the usual appeal.

No appeal was taken and Mr. Curry dismissed the contest.

The special report of the special agent referred to in this communication was that of J. W. McMechan, made in the fall of 1906.

Referring to the letter of November 11, 1903, it will be noted that Special Agent Hobbs, in making his protest against these entries, including the Stump entry, suggested that no patents be issued pending a further examination and report on these several entries. The McMechan report was the culmination of that "further examination." Owing to the fact that the several tracts involved were heavily covered with timber and that almost immediately after submission of final proof the several entrymen had transferred the tracts (twenty-one in number) to one Howard Morley, Mr. Hobbs quite naturally was led to believe that these entries were not made in good faith for the purpose of making homes thereon. The gist of his charges as contained in his protest is that the entrymen had attempted to acquire land of the United States in derogation of its laws and in fraud of the United States. Mr. McMechan's report corroborates the charge, although the facts which he developed upon examination rendered his conclusion independent of the almost immediate transfer of the property from Stump to Morley. The substance of both charges, namely, those preferred by Hobbs and by McMechan, was the same: namely, that Stump had not complied with the homestead law and at no time had entertained the *bona fide* purpose of making it his home. Such a conclusion is justified by the fact of an almost immediate transfer of the entryman's interest upon receiving his receipt. It is always justified by a finding that the entryman, prior to final proof, had not made that cultivation, those improvements, and that character of residence which indicate a purpose on his part of acquiring a homestead. And, as before suggested, the evidence in this case, based upon the testimony of the entryman alone, amply justifies the finding that his entry was devoid of that good faith which the homestead laws expect and require.

As to the Hobbs protest, precisely the language used by Mr. Justice Stafford in the Gribble case (see opinion, 37 L. D., 329) may be employed:

As defined by Webster, a protest is a "solemn declaration of opinion, commonly a formal declaration against some act." Is not that exactly what this is? It was the first step in a proceeding calculated to test the validity of the claimant's right to a patent. That step having been taken within two years, the statute of confirmation did not operate upon this claim.

Hobbs protested; that was the first step in a proceeding to test the validity of the entryman's right to a patent. Another special agent took the matter up, made an exhaustive, special investigation of the entry, and reported circumstances sustaining Hobbs's avowal of the lack of good faith on the part of the entryman. This was the second, warranting the third, step in the proceeding to test claimant's right to a patent: a hearing, of which notice was duly given, at which the parties in interest participated and were heard, and which developed facts fully justifying the decision involved in this appeal.

There is no error in the decision from which the appeal is taken, and the judgment below is therefore affirmed.

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SANTA FE PACIFIC R. R. CO. *v.* PETERSON.

*Decided January 6, 1911.*

SOLDIERS' ADDITIONAL—DEATH OF WIDOW—ASSET OF ESTATE.

Where the widow of a soldier made homestead entry in her own right for less than 160 acres and died prior to enactment of the Revised Statutes, the right of additional entry authorized by sections 2306 and 2307, R. S., became, upon such enactment, an asset of her estate, subject to assignment by her heirs, or to distribution, as other personal property.

PIERCE, *First Assistant Secretary*:

The Santa Fe Pacific Railroad Company, by J. C. Hunt, attorney in fact, appealed from decision of the Commissioner of the General Land Office, of September 29, 1910, holding selection of the Santa Fe Pacific Railroad Company, under act of June 4, 1897 (30 Stat., 36), for SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 14, T. 46, R. 2 W., B. M., Coeur d'Alene, Idaho, for cancellation for conflict with the prior location on the same land of the additional homestead right of Nancy Savage, widow of Daniel Savage, assigned to Marius C. Peterson, under section 2306, Revised Statutes of the United States.

Prior to November 6, 1909, the additional right was located, and by letter of that date the General Land Office required additional evidence to be submitted. January 5, 1910, the applicant was allowed sixty days within which to file and procure the additional evidence required. All requirements were complied with, January 24, 1910.

By errors of the land office, though the additional evidence was upon its files, this entry was held for cancellation, and June 3, 1910, was finally closed.

June 20, 1910, the Santa Fe Pacific Railroad Company, by its attorney Hunt, supposing the land had become vacant, selected it under act of June 4, 1897 (30 Stat., 36), in lieu of lot 3 of SW.  $\frac{1}{4}$ , Sec. 31, T. 20 N., R. 6 E., G. & S. R. M., in the San Francisco Mountains Forest Reserve, Arizona. The applicant, under soldiers' additional right, made protest against rejection of his application after he had fully complied with all requirements made by the General Land Office. On search of its files, the General Land Office discovered its error and held the forest lieu selection for cancellation for conflict with the location of the additional soldiers' right. From this order the Santa Fe Pacific Railroad Company appealed.

It is a rule well established in the land office that parties' rights are never prejudiced by errors of the land office. Peterson, having fully complied with all requirements of the land office, his entry for all purposes of administration must be regarded as never having been canceled. Whatever may be the injury to the forest lieu locator, the fact remains that Peterson is first in time, and consequently is first in right. The appeal, however, assigns as one of its errors the only one here requiring notice: that the land office erred—

in failing to find, as appearing on face of the record constituting the soldiers' additional homestead right, that both the soldier and his widow, whose alleged acts and rights are made the predicate of the soldiers' additional homestead right, died prior to enactment of the law creating soldiers' additional homestead rights, and that, as neither the soldier nor his widow were *in esse* when the law creating soldiers' rights was enacted, neither the widow nor her estate was legally vested with the right attempted to be located by applicant.

This raises the question whether an additional right ever in fact existed. The record showed that Daniel Savage enlisted September 18, 1861, in Company E, 37 Illinois Volunteer Infantry, and served until killed in battle at Prairie Grove, Arkansas, December 7, 1862. His wife, Nancy A. Savage, made homestead entry in 1869, for E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 2, T. 59 N., R. 3 E., 6th P. M., Beatrice, Nebraska, and died in Gage County, Nebraska, June 22, 1871. Whether the additional right accrued depends on the question whether the soldier, his widow, or some minor child must be living when the act passed granting additional rights, June 8, 1872 (17 Stat., 333). The survival of the soldier, his widow, or minor child at date of passage of the act has never been held by the Department as necessary to the existence of an additional right. In William D. Kilpatrick (38 L. D., 234), the record showed that Kilpatrick died in 1871 after having made an entry and the additional right was recognized as arising to him under the act. In John C. Mullery (34 L. D., 333), the soldier died in 1868, before the passage of the additional homestead act, and an addi-

tional right was recognized as arising to his widow who made the original homestead entry, less than 160 acres. Where the original entry had been made by the soldier, who died prior to the act creating soldiers' additional rights, and where his widow remarried without appropriating such right under section 2307 of the Revised Statutes, and no minor children of this union survived, it was held that the additional right was an asset of the soldiers' estate, devisable by him or vendible by his nearest of kin and heirs. See William D. Kilpatrick, *supra*; also Fidelo C. Sharp (35 L. D., 164), and Williford Jenkins (29 L. D., 510). This being true in the case of the soldier, it must for the same reason be true of his widow where she made the original entry and died prior to the enactment of the statute. The act creating the right under such circumstances also made it an asset of her estate and as such it was the subject of assignment by her heirs, or to distribution, as other personal property. To uphold the contentions of the appellant it would be necessary to overturn a long line of decisions and unsettle rights in property. The Department will adhere to the construction of the law heretofore given.

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### NORTHERN PACIFIC RY. CO. v. HURLEY.

*Decided January 7, 1911.*

#### RAILROAD SELECTION—CONFLICTING SETTLEMENT CLAIMS—APPEAL.

Where a railroad selection list covering lands embraced in homestead settlement claims was rejected because of such conflicts, and the company appealed generally from that action, without specifying within the time fixed by the Rules of Practice the particular entries it desired to contest, and with intent to prosecute its appeal only as to lands which might subsequently be relieved of conflicting claims, the Department will not recognize the appeal as saving any rights in the company, as against a subsequent reservation for forest purposes, in event of cancellation of the conflicting settlement claims as to any of the tracts involved.

#### PIERCE, *First Assistant Secretary*:

The Northern Pacific Railway Company appealed from decision of the Commissioner of the General Land Office, of July 25, 1910, rejecting its selection indemnity list, 78, for sundry tracts in sections 3, 5, 7, 19 and 25, T. 36 N., R. 44 E., Spokane, Washington, among which tracts was the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and lots 3 and 4, Sec. 3, T. 36 N., R. 44 E., for conflict with the homestead entry of Patrick H. Hurley.

June 5, 1906, the township plat was filed in the local office. On the same day at nine o'clock in the morning the agent of the railway company was at the door of the General Land Office and before opening of the door gave to the clerk of the land office its list, 76, of in-

demnity selections and 77, of selections in place limits. The agent informally received return of these lists from the clerk who had taken them for the purpose of making a clear list 76 and a list for conflict with homestead settlers, saying it would make no objection to homestead entries by applicants alleging prior settlement. At 10 a. m. it returned its clear list 76 and a list 78, including that part of 76 where applicants alleged prior settlement. The local office accepted list 76 and rejected list 78. Hurley, without objection from the railway company at that time, made homestead entry for the tracts here in question, which homestead entry was afterward canceled. The railway company appealed from the action of the local office rejecting its list 78. The tract in question August 2, 1906, was included within withdrawal for the Priest River Forest Reserve, and included within the reservation by executive proclamation of March 2, 1907 (34 Stat., 3309).

The decision of July 25, 1910, appealed from, affirmed the action of the local office because of the inclusion within the forest reserve, holding in substance that as Hurley's homestead application was allowed without objection of the railway company, when his entry was finally canceled the withdrawal for forest purposes took effect.

There was no error in so holding. The railway company, upon its appeal, states that it was a fundamental error in the reasoning of the decision to reject the list upon allegation of settlement without affording the company an opportunity to show the contrary. The appeal states that:

Not to unnecessarily delay those parties who had by submitting final proof fairly well demonstrated the correctness of their alleged prior settlement, we were willing to let their cases proceed freed from the conflict with the company. Therefore, we referred to the entire decision of July 25th, with particular reference to the following lands involved in said list:

S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and lots 3 and 4, Sec. 3, claimed by Patrick Hurley.

It so appears that the company intended by a general appeal to carry up all lands included in its list 78 with the reserved right, unexpressed, to prosecute its appeal only as to the particular tracts that might afterward fail of final proof.

The Department can not recognize such an appeal. There was nothing definite or specific, and an appeal with intent not to pursue it, and not to continue assertion of its rights as to tracts upon which settlers might abandon their settlement, is disingenuous. The company's rights were then good or they were not. If the settler's right was then good the company's selection was properly rejected irrespective of what might thereafter happen, and on cancellation of an entry then good no right of the railroad company would revive. The company should within the time allowed by the rules of practice have indicated what particular entries it desired to contest and as

to what ones it did not appeal. Failing to do this it can not at a later day after the land has fallen into a forest reserve retain its hold upon the tracts that *bona fide* settlers having valid rights might have afterwards relinquished.

The decision is affirmed.

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JOHN B. BRUQUIER.

*Decided January 7, 1911.*

**SIoux HALF-BREED SCRIP—LOCATION ON DOUBLE MINIMUM LAND.**

Double minimum lands are subject to location with Sioux half-breed scrip only upon payment of the difference between the single and double minimum price.

*PIERCE, First Assistant Secretary:*

This is the appeal of W. S. McLeod, administrator of the estate of John B. Bruquier, and D. N. McCall, attorney-in-fact, from a decision of the Commissioner of the General Land Office, July 18, 1910, requiring payment of \$1.25 per acre on Sioux half-breed scrip located on double minimum lands described as the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of Sec. 12, T. 34 S., R. 5 W., W. M., Roseburg land district, Oregon.

The question raised by this appeal is controlled by the decision of this Department in the case of George F. Thornton (38 L. D., 371), involving the location of Valentine scrip upon double minimum land, which is cited by the Commissioner of the General Land Office, and upon which his decision herein rests.

For the reasons therein stated the decision appealed from herein is affirmed.

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**TOWNSHIP PLAT—NOTICE OF FILING—LAND IN NATIONAL FOREST.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., January 9, 1911.*

REGISTERS AND RECEIVERS,  
UNITED STATES LAND OFFICES.

SIRS: In all cases where you hereafter receive plats of the surveys of any townships situated wholly or in part within National Forests, with instructions to file them in your office, you will at once mail to the Supervisors of the National Forests within which such townships are located a copy of the notice of such filing required by the in-

structions of October 21, 1885 (4 L. D., 202), for their instruction and guidance.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary.*

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MINERAL OR AGRICULTURAL CLAIMS WITHIN NATIONAL PARKS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., January 10, 1911.*

REGISTERS AND RECEIVERS,  
*United States Land Offices;*  
CHIEFS OF FIELD DIVISIONS; AND  
SUPERINTENDENTS OF NATIONAL PARKS:

SIRS: Under date of November 12, 1910, the Secretary of the Interior advised this office, among other things, as follows:

It is desirable that in so far as it is possible the title to lands within the limits of National Parks should remain in the Government, so that the parks may be protected, developed and controlled by the United States. In a number of parks, however, there are claims, mineral or agricultural, upon which possession is being maintained on the ground that the claims were initiated prior to the creation of the parks or the inhibition of further disposition or acquisition of lands therein.

Accordingly, in all cases of applications to make final proof, final entry, or to purchase public lands, under any public land law, the register and receiver will, where any of said lands are within the limits of National Parks, at once forward a copy thereof to the Chief of Field Division of Special Agents. Such copy as well as the original application will be indorsed with the name of the National Park within which the said land, or any portion thereof, is situate. A second copy will also be forwarded to the Superintendent in charge of the National Park.

Valid entries may proceed up to and including the submission of final proof, but no purchase money will be received or final certificate of entry issued until further orders. The record of the entry should be forwarded with your regular monthly returns, and will be held in this office until receipt of the report of the special agent and the superintendent of the park.

The Chief of Field Division, on receipt of such copy of notice, will make a case thereof on his docket, and will also make a field examina-

tion of the lands so sought to be entered, and submit a report thereof direct to this office.

Chiefs of Field Divisions and Superintendents will exert every effort to make the field examination prior to date for final proof.

Where the claim sought to be entered is upon unsurveyed land, the registers and receivers will carefully examine the plat and field notes of survey of such claim, and such other data as may be available, to ascertain the true locus thereof with respect to National Parks; and, if in any doubt as to whether or not the land sought to be purchased is within a National Park, they should call upon the Surveyor-General for a report in the premises.

The attention of local officers, chiefs of field divisions and superintendents of National Parks, is called especially to the last sentence of the Secretary's order, which reads as follows:

You will also, upon receipt of report or allegation from special agents or from others that any locations or claims within National Parks, for which applications for patent or entry have not been made, are invalid or are not being maintained as required by law, report such cases to this Department in order that appropriate instructions may be issued and action taken.

As will be observed, this relates to locations or claims, mineral or agricultural, within National Parks, for which no applications for patent or entry have been presented to the local officers. Under these instructions you need not await the presentation of an application for patent for these locations or claims prior to making any investigation or report to this office; but you will promptly, in all such cases as are by you, for any reason, deemed to be invalid (or reported to you as being invalid), submit your report and recommendations with respect thereto, in order that this office may at the earliest possible moment take such steps, through the Department, as may be appropriate and necessary to protect the interests of the Government in the premises.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary.*

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FRANCIS W. BOSCO ET AL.

Motion for review of departmental decision of July 19, 1910, 38 L. D., 104, denied by First Assistant Secretary Pierce, January 11, 1911.



## VIRINDA VINSON.

*Decided January 16, 1911.*

## PREFERENCE RIGHT OF CONTESTANT—NOT TRANSFERABLE.

The preference right of entry of a successful contestant is not transferable.

## WHEN PREFERENCE RIGHT ACCRUES—APPLICATION THEREUNDER.

No preference right of entry accrues as result of a contest until final judgment of cancellation has been rendered; and in exercise of such right the contestant is bound by the regulations in force at the time his application is filed.

## TIMBER AND STONE ACT—AUTHORITY FOR APPRAISAL OF LAND.

The timber and stone act of June 3, 1878, which fixes merely the minimum price at which lands are to be sold thereunder, sufficiently warrants appraisal and sale of lands thereunder at a higher rate.

## JURISDICTION OF LAND DEPARTMENT—CONSTITUTIONALITY OF STATUTE.

The land department is without authority to pass upon the constitutionality of a statute, that question being within the province of the courts; and in the absence of a final decision by the courts holding unconstitutional an act dealing with public lands, the land department must proceed with the administration thereof.

PIERCE, *First Assistant Secretary*:

This is an appeal by Virinda Vinson from the decision of the Commissioner of the General Land Office of July 25, 1910, dismissing her protest against the appraisal of the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 26, T. 26 S., R. 3 W., W. M., Roseburg, Oregon, land district, for which she made timber and stone application No. 05628, November 6, 1909.

The appeal states that the above land was embraced in the homestead entry of Amasa M. Sanders, which was contested January 10, 1907, by W. R. Vinson, the husband of the appellant. Hearing thereon was held January 11, 1908, and on February 11, 1908, the register and receiver rendered their decision, holding the homestead entry for cancellation, which was affirmed on appeal by the Commissioner October 10, 1908, and by the Department May 4, 1909, the decision becoming final October 11, 1909, when the homestead entry was canceled.

The appellant contends that she succeeded to the rights of the successful contestant; that the judgments of cancellation rendered by the register and receiver and the Commissioner were prior to the adoption of the regulations of November 30, 1908 (37 L. D., 289), relative to the appraisal of lands under the timber and stone law; and that she therefore should be permitted to purchase at the rate of two dollars and fifty cents per acre. It is further contended that the act of June 3, 1878 (20 Stat., 89), fixes the price at which lands under it should be sold at two dollars and fifty cents per acre; that no authority is contained in that act for the appraisal of lands by the Department; and, further, that if such authority be contained therein,

the act, in that respect, would be unconstitutional, as being a delegation of legislative power to an executive department. It appears that the land has been appraised at eight hundred and forty-six dollars, and the appellant has paid that amount, under protest.

It is not clear what relief the appellant expects to achieve in the present form of the proceedings, as it is not now a matter of the approval or rejection of an application for the repayment of excessive purchase money paid. However, assuming that in effect the matter is an application for repayment, the Department is of the opinion that the action of the Commissioner must be affirmed.

Although it is urged that appellant succeeded to the rights of her husband, there is no showing in the record as to when or in what manner she succeeded to these rights. Further, it is well settled that the preference right of entry of the successful contestant is not transferable, and it would therefore be impossible for her to succeed to her husband's rights. It is further well settled that no preference right of entry arises until the final judgment of cancellation has been rendered, and so, in this case, if the successful contestant himself desired to exercise his preference right of entry by making application under the timber and stone law, he would be bound by the regulations in effect at the time his application was made.

The act of June 3, 1878, provides, in section one, for the sale of land subject to it "at the minimum price of two dollars and fifty cents per acre." Section two provides, as part of the penalty of any false swearing, that the applicant "shall forfeit the money which he may have paid for said lands." In section three it is provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office." The act of December 13, 1894 (28 Stat., 594), directed that military bounty land warrants should be "receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered" under the timber and stone law. The above are the provisions of law relative to the price to be received by the Government for lands under the timber and stone act. As the act provides simply the minimum price, and also authorizes the Commissioner of the General Land Office to prescribe regulations to carry the act into effect, the Department is of the opinion that there is sufficient authority therein for the regulations of November 30, 1908.

Appellant's contention that the act would be unconstitutional, as being a delegation of legislative authority, is not one which can be passed upon by the Department. Any question of the constitutionality of a statute must be decided by the courts, and in the absence of a final decision holding an act to be unconstitutional, the Department must proceed with the administration thereof.

The decision of the Commissioner is accordingly affirmed.

## HEIRS OF ANTHONY SIANKIEWICZ.

Petition for exercise of the supervisory authority of the Secretary for reconsideration of departmental decisions of August 17, 1909, not reported, and April 16, 1910, 38 L. D., 574, denied by First Assistant Secretary Pierce, January 16, 1911.

## DUNN v. HUTTON.

*Decided January 16, 1911.*

## HOMESTEAD APPLICATION—CONCURRENT APPLICATIONS.

One can not by two concurrent homestead applications hold segregated double the quantity of land he is entitled to enter.

PIERCE, *First Assistant Secretary*:

Lawrence J. Dunn appealed from decision of the Commissioner of the General Land Office of August 15, 1910, denying his application to enter the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 33, T. 10 N., R. 15 E., Rapid City, South Dakota, and awarding it to George E. Hutton.

March 24, 1908, Hutton filed two homestead applications—one for NE.  $\frac{1}{4}$ , Sec. 33, marked "first choice," and one for N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 22, same township, marked "second choice." At that time one Walrath had an application pending for a second homestead entry for the NE.  $\frac{1}{4}$  of Sec. 33. The local office rejected Hutton's first application for conflict therewith, and also rejected his second choice, probably because he had another application pending.

Hutton appealed from the action of the local office as to both applications. April 8, 1908, he dismissed his appeal as to the NE.  $\frac{1}{4}$  of Sec. 33, and thereby elected to abide his second choice application for the land in Sec. 22. August 1, 1908, Walrath's application for entry was denied by the General Land Office. December 8, 1908, Dunn applied for homestead entry for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 33, here in controversy. The local office had not transmitted to the General Land Office Hutton's waiver of his appeal as to the land in 33 and it remained on the local office files. When Walrath's application was denied, the General Land Office, uninformed of Hutton's waiver of right to the NE.  $\frac{1}{4}$  of Sec. 33, directed allowance of his entry for that tract and rejected his second choice application. The local office, finding itself embarrassed by the direction so given and by Dunn's application, reported the facts to the General Land Office, and stated, among other things:

The records of this office further disclosed that both of the tracts in question applied for by Mr. Hutton are reserved on the records of this office in his name.

August 3, 1909, the local office again reported to the General Land Office the conflict between the applications of Dunn and Hutton as to the land in NE.  $\frac{1}{4}$  of Sec. 33, and the General Land Office, May 24, 1910, by some oversight, directed allowance of both applications, it being directed that "in absence of objection allow Hutton's application 04506, which is herewith returned." This was in face of a conflict on the record before the General Land Office, showing a conflict between Dunn and Hutton as to the land in controversy, so that there was in fact no "absence of objection." The local land office, June 2, 1910, again asked instructions, and, August 15, 1910, the General Land Office directed allowance of Hutton's application for NE.  $\frac{1}{4}$ , Sec. 33, including the land in conflict, and application of Dunn for subdivisions that did not conflict with Hutton's application. From this decision Dunn appealed.

It is shown that Dunn filed his application at the local office at a time when the record showed Hutton had abandoned his application for land in Sec. 33 and was standing upon his second choice for land in 22. Dunn has built two houses, one of which was destroyed by fire, and has established actual residence in the faith of such record. His application at the time made was a proper one, for land not in conflict, and should properly have been allowed, as Hutton had waived his appeal as to that land. Had the local office forwarded that waiver, to be considered with Dunn's appeal, the action of the General Land Office must have been different from what it was. Entry could not have been allowed to Hutton for the land in the face of his waiver. Whether it should have been allowed to him for the land in Sec. 22 would depend upon the question as to whether there was any right conflicting therewith.

One can not hold segregated by two applications double the quantity of land which he is allowed to enter. When Hutton found he was in conflict with Walrath, he might have contested rights with him to that land on his appeal, but he could not hold other lands segregated, and when he yielded to Walrath and waived his appeal, he held no claim on any land, unless it was that in his second choice, in Sec. 22. He can not contest or prosecute an appeal for both tracts, and thus keep another qualified person from making an entry. Dunn's application was made at a time when no claim was asserted by Hutton to the land in Sec. 33, and was pursued in good faith by the establishment of entry and improvements. His right is superior to that of Hutton. Whatever embarrassment or loss Hutton has is due to his attempt to segregate twice his right and to his vacillating and equivocal way of attempting to maintain it, even after he had waived and Dunn had made his settlement and application. He is himself to blame for the position he is in, and Dunn is innocent. Hutton may make entry for the land not in conflict in the NE.  $\frac{1}{4}$

of Sec. 33, including any contiguous land subject to entry, to fill his right to one hundred and sixty acres, or may waive rights under that application, as he has once done, saving his homestead right.

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POUNDER *v.* ALLEN.

Motion for review of departmental decision of November 10, 1910, 39 L. D., 348, denied by First Assistant Secretary Pierce, January 16, 1911.

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KIMBLE *v.* HEIRS OF ELSETH.

*Decided January 17, 1911.*

CONTEST—HEIRS—CHARGE.

An affidavit of contest against the heirs of a deceased homestead entryman which charges only failure to reside upon the land is defective, and should include also a charge that the heirs have not cultivated the land.

CHARGE OF FAILURE TO IMPROVE INCLUDES FAILURE TO CULTIVATE.

The charge in an affidavit of contest that the heirs of a deceased entryman have not "in any way improved" the land is equivalent to and constitutes a sufficient charge of failure to cultivate.

EFFECT OF FAILURE TO ALLEGE DEATH OF ENTRYMAN.

An affidavit of contest against the heirs of a deceased entryman which fails to allege the death of the entryman and the date thereof is defective, but subject to amendment in that respect if objected to; but where hearing is had on the contest without objection on the ground of such omission, and the evidence adduced establishes the fact and date of death of the entryman, objection on that ground will not thereafter be considered.

PIERCE, *First Assistant Secretary*:

Appeal is filed by William F. Kimble from decision of July 2, 1910, of the Commissioner of the General Land Office, modifying the action of the local officers and dismissing the contest filed by said Kimble, February 11, 1908, against the homestead entry made May 26, 1906, by Peter S. Elseth, deceased, for the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 32, T. 20 N., R. 27 E., W. M., Waterville, Washington, land district.

The affidavit of contest herein charges—

That the said Peter S. Elseth, deceased, has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law; that neither Peter S. Elseth, in his lifetime, nor Samuel Peterson Elseth, his father, and Annie P. Elseth, his mother, and the only heirs, after the death of Peter S. Elseth, the entryman of record, ever resided or in any way improved said tract after the death of the entryman.

Notice of contest was personally served March 11, 1908, upon Samuel P. and Annie P. Elseth. The parties appeared with counsel at the hearing. Preliminary motion to dismiss the contest was made upon the ground that the contest affidavit does not charge that the heirs of the entryman have failed to cultivate the land involved. Testimony was taken by both sides and the local officers rendered decision stating—

From the testimony introduced, we find that the entryman, Peter S. Elseth filed on the land above described on the 26th of May, 1906, and that soon after filing he was taken sick and was removed to a hospital in Tacoma, Washington, where he lingered for some time and then finally died on December 17, 1906, without having established a residence on the land involved.

That his only heirs were his father, Samuel Peterson Elseth, and Annie S. Elseth, who were both quite old and feeble, his father being about seventy-two years of age; that in July, 1907, his father had one acre broken on the place, and made a contract with one Charles G. Myers to break 10 acres, but on account of the dry weather Myers only plowed three acres.

That owing to his sickness and subsequent death soon after filing entryman was unable to establish a residence on his land or to improve it in any manner; that during the winter it was impossible for the heirs to make any improvements on the land, and, after considering the age and health of the parents, who are the only heirs, we are of the opinion that they exercised due diligence in trying to improve the land, and that they acted in good faith. That had it not been for his sickness entryman would have fully complied with the law.

We therefore recommend that the contest be dismissed and the entry remain intact.

The Commissioner stated in the decision appealed from—

The affidavit of contest is defective, not only for the reason stated in the defendants' motion, but because the death of the entryman is not directly alleged and the date of his death is not charged. In the absence of a charge of the date upon which Peter S. Elseth died it was obviously impossible for you to have determined whether or not the contest was prematurely initiated.

The testimony in this case can not be properly considered in disposing of the contest since the motion to dismiss should have been sustained. Upon the death of the entryman his heirs had the option of either residing upon or cultivating the land, but were not required to do both.

The words "improve" and "improvements" as used in matters coming before the Land Department refer to buildings, fences, and other structures placed upon the land, and do not include "cultivate" and "cultivation." Improvements are regarded as the personal property of an entryman, and the term has a fixed and definite meaning, as above stated.

The appeal contains various assignments of error in the decision appealed from with reference particularly to the several alleged defects in the affidavit of contest.

With reference to the said motion to dismiss made at the hearing, it is held by the Department that the heirs of a deceased entryman need not both reside upon and cultivate the land covered by the entry in order to complete title thereto, but that they may either

reside upon or cultivate the same. Heirs of Stevenson v. Cunningham (32 L. D., 650).

An affidavit of contest alleging only a failure to reside upon the land, in a contest against the heirs of a deceased entryman, is defective, as proof of such fact alone will not warrant cancellation of the entry. Such affidavit should include also a charge against the heirs of non-cultivation.

The Department does not concur in the finding in the decision appealed from, that the contest affidavit herein does not contain a sufficient charge that the heirs have not cultivated the land since entryman's death.

The language employed in the contest affidavit herein, viz., that the heirs have not "in any way improved said tract after the death of the entryman," does not appear to have been employed in the technical sense stated in said decision. The verb "to improve" means "to ameliorate by care or cultivation; as, to improve land," or, "to use or employ to good purpose; to make productive." (Webster's International Dictionary.) The plural form of the word, "improvements," only, appears to be used in the sense stated in said decision—"valuable additions or betterments, as buildings, clearings, drains, fences, etc., on premises." (Webster, *supra*.)

The contest affidavit herein is therefore considered a sufficient affidavit charging non-cultivation by the heirs of this entry.

While said affidavit is defective in not specifically alleging the death of the entryman and the date of his death, these are matters which may be the subject of amendment if objected to (Frank v. Corliss Heirs, 27 L. D., 510). No objection to said affidavit upon these grounds, however, was made; and notice of contest, by which jurisdiction was acquired herein, having been given and hearing had, and the proof in the case showing the death of the entryman and the date of his death more than a year prior to said notice of contest, the contest may properly be entertained.

Upon the merits of this case, the Department concurs in the conclusion reached by the local officers. The testimony shows, in addition to the facts stated in their decision, that further plowing of the land, under the contract mentioned, was delayed because of the dry weather. In February, 1908, the party who had contracted to plow ten acres offered to complete the work, stating the ground was then in good shape, and three acres more appear to have been plowed about the first of March, 1908, prior to the service of notice of this contest and prior to knowledge thereof by the heirs. Under these circumstances and those stated in the decision of the local officers, the heirs do not appear to have been in default, and the contest should be dismissed upon the merits.

The decision appealed from is modified accordingly.

HALVOR K. HALVORSON.

*Decided January 18, 1911.*

## RED LAKE LANDS—COMMUTATION OF HOMESTEAD—SHOWING REQUIRED.

Commutation of a homestead entry of lands within that portion of the Red Lake Indian reservation opened under the provisions of the act of February 20, 1904, may be allowed upon a showing that the entryman established actual residence within six months from the date of entry; that such residence was maintained for such period as added to the period intervening between the date of entry and the establishment of residence equals a period of fourteen months; and that he was actually residing upon the land at the time of submitting such proof.

PIERCE, *First Assistant Secretary*:

Under date of November 14, 1910, the Commissioner of the General Land Office rejected the commutation proof of Halvor K. Halvorson, submitted upon his homestead entry for lots 2 and 7, Sec. 2, T. 151 N., R. 39 W., and the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 35, T. 152 N., R. 39 W., 5th P. M., Crookston land district, Minnesota.

Halvorson's entry for said land was allowed November 16, 1908, and he submitted commutation proof thereon February 15, 1910, making payment of the remaining amount due on the purchase price of four dollars per acre.

The lands are a part of the ceded portion of the Red Lake Indian Reservation, opened to entry under the provisions of the act of February 20, 1904 (33 Stat., 46), which fixed the price of four dollars per acre for such lands as were not purchased at public sale. That act provided, among other things, that entries were to be made subject to the provisions of the homestead laws, including section 2301 of the Revised Statutes, which grants the right of commutation by paying the purchase price after fourteen months' residence and cultivation.

The proof shows that Halvorson established residence on the land on May 15, 1909, and that he had resided there continuously for a period of nine months next preceding the submission of his proof on February 15, 1910.

The action of the Commissioner of the General Land Office was put mainly upon paragraph one of the circular of October 18, 1907 (36 L. D., 124), which reads as follows:

Commutation proof offered under a homestead entry made on or after November 1, 1907, will be rejected unless it be shown thereby that the entryman has, in good faith, actually resided upon and cultivated the land embraced in such entry for the full period of at least fourteen months.

Inasmuch as the entry here in question was made after November 1, 1907, it not being shown that the entryman had resided upon and cultivated the land embraced in such entry for the full period of



fourteen months, and the regulation seemingly applying to all homestead entries, no reason was perceived by the Commissioner's office why such proof should be allowed.

In the essentially similar case of Telluf B. Nesland (unreported), decided by Mr. Secretary Garfield December 17, 1907, referring to said act of February 20, 1904, it was said:

While the act provides that purchasers of this land at public sale shall make final proof conformable to the homestead laws, it is nevertheless manifest from its provisions that the primary purpose of the act was to create from the sale of this land the largest possible fund for the benefit of the Indians, the act even going so far as to provide that persons who had exhausted their rights under the homestead law might become purchasers under the act, and that all such lands as remained unsold after five years from the date of the first sale shall be offered for sale "without any conditions whatever except the payment of the purchase price" at a rate of not less than four dollars per acre. In view thereof and of the large price paid by purchasers of these lands at public sale, the Department is of opinion that the reasons existing for the rule applied in cases of ordinary commutation proof in the matter of residence do not exist with respect to entries made by purchasers at public sale under this act. It is therefore held that as to such purchasers at public sale who have submitted, or may submit, commutation proof on their entries, the requirements of the statute as to residence are sufficiently met where such proof shows that actual residence was established on the land in good faith within six months from the date of the entry; that such residence was maintained for such period or periods as, when added to the period intervening between the date of the entry and the establishment of residence, equals fourteen months; and that the purchaser was actually residing on the land at the date of submitting such proof.

The case cited only differed from the one here under consideration in that the land there involved was purchased at public sale, whereas that here involved was appropriated by subsequent entry. This difference is not material. A provision of said act of February 20, 1904, reads as follows:

That after the first sale hereunder shall be closed, the lands remaining unsold shall be subject to sale and entry at the price of four dollars per acre by qualified purchasers, subject to the same terms and conditions as herein prescribed as to lands sold at first sale.

The lands here in question, therefore, are subject to sale and entry on the same terms and conditions as were those involved in the Nesland case, and, of necessity, the same rule of administration should apply.

It appearing that Halvorson established his actual residence upon this land within six months from the date of his entry; that such residence was maintained for such period as, when added to the period intervening between the date of the entry and the establishment of residence, equals a period of more than fourteen months; and that he was actually residing upon the land at the time of submitting such proof, it will, in the absence of other objection, be accepted.

## MANNER OF PROCEEDING ON SPECIAL AGENTS' REPORTS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 19, 1911.

TO SPECIAL AGENTS AND REGISTERS AND RECEIVERS,

*United States Land Offices:*

The following rules are prescribed for the government of proceedings had upon the reports of special agents of this office. All existing instructions in conflict herewith are superseded.

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of the special agent's report this office will consider the same and determine therefrom whether the charges, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entryman and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must state fully the charges as contained in the letter of this office, the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true, (a) unless the entryman or claimant files in the local office within thirty days from receipt of notice a written denial, under oath, of said charges, with an application for a hearing; (b) or if he fails to appear at any hearing that may be ordered in the case.

6. Notice of the charges may in all cases be served personally upon the proper party by any officer or person, or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post-office nearest to the land. Proof of personal service shall be the written acknowledgement of the person served, or the affidavit of the person who served the notice attached thereto, stating the time, place and manner of service. Proof of service of notice by registered mail shall consist of the affidavit of the person who mailed the notices, attached to the post-office registry return receipts, or the returned unclaimed registered letters.

7. If a hearing is asked for, the local officers will consider the same and confer with the chief of field division relative thereto and fix a date for the hearing, due notice of which must be given entryman or claimant. The above notice may be served by registered mail. By

ordinary mail a like notice will be sent the chief of field division, and when the land is in a national forest, the proper forest field officer will be also notified.

8. The chief of field division will duly submit, upon the form provided therefor, to this office, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The special agent must appear with his witnesses on the date and at the place fixed for said hearing, unless he has reason to believe that no appearance for the defense will be made, in which event no appearance on behalf of the Government will be required. The special agent must, therefore, keep advised as to whether the defendant intends to appear at the hearing. The chief of field division may, when present, conduct the hearing on behalf of the Government.

10. If the entryman, or claimant fails to deny the charges under oath and apply for a hearing, or fails to appear at the hearing ordered, without showing good cause therefor, such failure will be taken as an admission of the truth of the charges contained in the special agent's report and will obviate any necessity for the Government's submitting evidence in support thereof, and the Register and Receiver will forthwith forward the case with recommendation thereon to the General Land Office, and notify the parties by registered mail of the action taken.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the special agent's charges.

12. If a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof, in the usual manner.

13. Appeals or briefs must be filed under the rules and served upon the special agent in charge of hearing, and when land is in a National Forest, upon the proper District Assistant to the Solicitor of the Department of Agriculture. The special agent will not file any appeal or brief unless directed to do so by this office, or the chief of field division.

14. The above proceedings will be governed by the Rules of Practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary.*

[4-018a.]

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE.

SIR:

By authority of General Land Office letter "P" dated \_\_\_\_\_,  
you are hereby notified that a special agent of that office has filed the following  
charges against the validity of your \_\_\_\_\_ entry, No. \_\_\_\_\_,  
made \_\_\_\_\_, for \_\_\_\_\_,  
\_\_\_\_\_ to wit:

You are notified that if you fail to file in this office, within thirty days of  
date of service of this notice, a written or printed answer, under oath, denying  
each of said charges, or showing a state of facts rendering said charges im-  
material, and applying for a hearing to determine the truth of said charges  
and answer, or if you fail to appear at a hearing applied for, your said above  
entry or claim will be forthwith reported to the Commissioner of the General  
Land Office for rejection or cancellation.

Respectfully,

Register.

## BAKERSFIELD FUEL AND OIL CO.

*Decided January 19, 1911.*

## PLACER LOCATION—OIL LANDS—TRANSFeree.

A placer location of oil lands for 160 acres, made by eight persons and subsequently  
transferred to a single individual, invalid because not preceded by discovery,  
can not be perfected by the transferee upon a subsequent discovery to the full  
area so located, but only as to twenty acres thereof.

## CORPORATION—REGARDED AS ENTITY IN ACQUIRING PUBLIC LANDS.

A corporation in acquiring title under the public land laws must be regarded as an  
entity, with no greater right than an individual.

## DISCOVERY—PREREQUISITE TO INITIATION OF TITLE.

Discovery of mineral is an essential prerequisite to initiation of title under the  
mining laws.

## DISCOVERY SUBSEQUENT TO LOCATION—DOCTRINE OF RELATION.

While discovery of mineral subsequent to location of a mining claim is sometimes  
held by the land department to relate back to the date of location, where there  
was no precedent discovery, the doctrine of relation can not be invoked to the  
disadvantage of intervening adverse claims nor to permit any one to secure  
more land by indirect means than may be done directly.

PIERCE, *First Assistant Secretary:*

The Bakersfield Fuel and Oil Company, a corporation organized  
and existing under the laws of the State of California, appellant herein,  
applied for a patent to the Pitney No. 2 oil placer claim, containing

160 acres, situate in the Visalia, California, land district. The Commissioner of the General Land Office held that the company could secure patent to only 20 acres and required it to elect which 20 acres it would take and to cast off the excess of 140 acres, basing his decision on the Yard Case (38 L. D., 59). The company has appealed to the Department.

On the 22nd day of June, 1899, eight persons attempted to locate said 160 acres of land as a single oil placer mining claim. No discovery of oil or other mineral had been made. During the month of August, 1899, and before discovery, all of said eight persons conveyed their so-called claim to the appellant company which sunk a well on the claim and actually discovered oil in paying and commercial quantities on the 25th day of September, 1900, at a depth of 1207 feet. No oil or other mineral was discovered in the claim prior thereto.

The case has been exhaustively and ably argued by eminent counsel, and carefully prepared briefs have been filed. The law of the case is within narrow limits and was clearly announced in the Yard Case, *supra*, that a placer location of 160 acres, made by eight persons and subsequently transferred to a single individual before discovery, can not be perfected by the transferee upon a subsequent discovery to over 20 acres. While the Yard Case involved placer locations for gold and other precious minerals, it can not be distinguished from the case at bar. The placer law was applied to oil lands by act of Congress on February 11, 1897 (29 Stat., 526). The Act of May 10, 1872, carried into the Revised Statutes as Sec. 2331, declares that no placer location shall include more than 20 acres for each individual claimant. This is a limitation upon the size of an individual claim. The Department has frequently held that a corporation in acquiring public lands is a single entity and has no greater right than an individual. (Igo Bridge Extension Placer, 38 L. D., 281, and other cases).

Discovery of mineral is the one absolutely necessary prerequisite to the initiation of title to mineral lands on the public domain. Until discovery is made the so-called locators hold their possession by sufferance and not by right; until discovery is made they acquire no interest in the public domain and have nothing to convey. But it is pressed upon our attention that locations are frequently made without discovery of mineral and that upon discovery the claims relate back to date of location. It is true that the Department often recognizes the validity of such locations by relation, but the doctrine of relation has never been invoked to the disadvantage of intervening adverse claimants, nor to permit any one to secure more land in an indirect method than he could directly.

Appellant relies upon the case of *Miller v. Chrisman* (140 Cal., 440), in which the Supreme Court of California clearly decided adverse to the doctrine of the *Yard Case*. While the Department has great respect for the decisions of the state courts, it does not feel bound to follow them at all times. The case of *Miller v. Chrisman* was carried to the Supreme Court of the United States and there affirmed (197 U. S., 313). A careful and critical examination of the opinion of the Supreme Court of the United States convinces the Department that that court did not intend to and did not adopt the doctrine laid down by the Supreme Court of California. There is no suggestion in the opinion that would warrant any such conclusion. It turned upon another point, that the intervener had not made such a discovery as would entitle him to protection. We do not regard it as an authority in the case at bar.

It is pressed upon our attention that the method pursued by the appellant in its attempt to acquire patent to public oil land has been the common method in use in California for many years and that many patents have been issued under similar circumstances. This is the first time the question has been presented to the Department for decision. Whenever a new question is presented it must be decided upon the law, and if the interpretation of the law works disadvantageously or inequitably relief should be secured through Congress; and in view of the situation existing the Department has already called the attention of Congress to the facts and recommended remedial legislation in favor of those *bona fide* locators who have diligently prosecuted their work to fruition. The decision is affirmed.

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WILLIAM GLASSNER.

*Decided January 20, 1911.*

SOUTHERN UTE INDIAN RESERVATION—COAL LANDS—ACT JUNE 22, 1910.

The provisions of the act of June 22, 1910, are applicable and operative upon the coal lands, or those lands withdrawn or classified as coal, and otherwise unreserved, situated within the former Southern Ute Indian reservation.

PARAGRAPH 2, INSTRUCTIONS OF SEPTEMBER 8, 1910, MODIFIED.

Directions given for the modification of paragraph 2 of instructions of September 8, 1910, 39 L. D., 179, by elimination of the last sentence thereof.

PIERCE, *First Assistant Secretary*:

William Glassner who, on June 29, 1910, presented his homestead application, No. 02792, for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and lots 3 and 4, Sec. 19, T. 34 N., R. 6 W., N. M. P. M., Durango, Colorado, land district, has appealed from the decision of the Commissioner of the General Land Office of December 3, 1910, holding the application for rejec-

tion, upon the ground that it could not be allowed under the act of June 22, 1910 (36 Stat., 583).

From the record it appears that this land is within the territory formerly embraced within the Southern Ute Indian reservation. The tracts were classified in 1909 as coal lands and appraised at \$20 per acre. The land was also formerly embraced in a national forest, but pursuant to the act of June 11, 1906 (34 Stat., 233), was listed for agricultural entry in list No. 2-34.

In his application Glassner inserted the following clause:

That I hereby expressly waive any and all right to any coal that may be in said land, and hereby agree to accept a patent therefor excluding all right thereto, pursuant to the provisions of law.

The Commissioner's decision concluded as follows:

Section 2 of the circular of September 8, 1910, instructions under the act of June 22, 1910, states that said act "does not change, repeal, or modify agreements or treaties made with Indian tribes for the disposition of their lands, or apply to lands ceded to the United States to be disposed of for the benefit of such tribes." Accordingly, this application can not be allowed under the act of June 22, 1910. You (register and receiver) will accordingly allow applicant sixty days within which to submit affidavits, under paragraph 1 of the circular of September 7, 1909, copy herewith, and to apply for reclassification, in default of which and of appeal, the application will be rejected without further notice from this office.

The appellant contends that the Commissioner erred in holding that the application could not be allowed under said act of June 22, 1910, for the reason that the Southern Ute lands were opened to disposition pursuant to the act of February 20, 1895 (28 Stat., 677), which declared such lands to be *a part of the public domain of the United States*, and that thereupon the same necessarily became unreserved public lands.

This contention is believed to be well founded. The lands formerly embraced within the Southern Ute Indian reservation were opened to settlement and entry pursuant to the Presidential proclamation of April 13, 1899 (31 Stat., 1947), following the act of February 20, 1895, *supra*, section 4 of which act provided that the President should issue his proclamation declaring the lands within said Southern Ute Indian reservation, except such portions as may have been allotted or reserved—

open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands: *Provided*, That before said lands shall be open to public settlement the Secretary

of the Interior shall cause the improvements belonging to Indians on the lands now occupied by them to be appraised and sold at public sale. . . .

SEC. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars . . . that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians.

The act of June 13, 1902 (32 Stat., 384), extended the provisions of the free homestead law to the lands included within the limits of the former Ute Indian reservation and at the same time expressly provided that all sums of money that might be lost to the Ute Indian fund by reason of the passage of that act should be paid into such fund by the United States.

The act of March 1, 1907 (34 Stat., 1056), extended and made applicable the Carey Act (28 Stat., 422), as amended (29 Stat., 433; 31 Stat., 1188), to the former Ute Indian lands in Colorado and provided that before a patent should issue the State should pay to the United States the sum of \$1.25 per acre, such money, to be held in trust for the Indians.

The act of June 22, 1910, entitled "An act to provide for agricultural entries on coal lands," declares that from and after its passage "unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection" under the Carey Act, and to withdrawal under the reclamation act, "whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same."

It is provided in section 2 of this act that it shall be stated "in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this act."

The terms "public domain" and "public lands" are usually synonymous. The Supreme Court of the United States, speaking through Mr. Justice Brewer, in the case of *Barker v. Harvey* (181 U. S., 481, 490), said:

"Public domain" is equivalent to "public lands" and these words have acquired a settled meaning in the legislation of this country. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general law." *Newhall v. Sanger*, 92 U. S., 761, 763.

There is nothing on the face of the act of June 22, 1910, that suggests any inapplicability of its terms to these ceded Indian lands. It being apparent that homestead, desert land, and Carey Act statutes



are operative upon the agricultural lands on the one hand, and the coal-land laws applicable to the Southern Ute coal lands on the other (areas subject to the latter form of disposition being necessarily excluded under the general laws from the operation of the former), no good reason is perceived or support found for denying the operation of the act of June 22, 1910, upon these Southern Ute lands, which act accomplishes a blending of the two classes of disposition—the agricultural and the coal.

The Department accordingly holds that the provisions of the act of June 22, 1910, are applicable and operative upon the coal lands or those lands withdrawn or classified as coal, and otherwise unreserved, situated within the former Southern Ute Indian reservation.

Inasmuch as the Commissioner has considered the sentence quoted from the instructions of September 8, 1910, *supra*, as a departmental preadjudication of this question, necessarily binding upon his office, that sentence should be eliminated from the instructions, so that no difficulty will hereafter be encountered in the free interpretation and proper application of the several statutes affecting the disposition of ceded Indian lands, as cases may arise.

A circular will be prepared for the purpose of making the modification above mentioned.

Glassner's homestead application here in question, when amended by having noted across the face thereof the following: "Application made in accordance with and subject to the provisions and reservations of the act of June 22, 1910 (36 Stat., 583)," as is required by paragraph 7, subdivision a, of said instructions of September 8, 1910, will be allowed, in the absence of other objections.

The Commissioner's decision is accordingly reversed, and the homestead application will be remanded to the local officers for further proceedings.

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NAUHA *v.* SMALLWOOD.

*Decided January 20, 1911.*

CONTESTANT'S PREFERENCE RIGHT—TRANSFeree—SOLDIERS' ADDITIONAL.

While a homesteader whose entry is canceled as result of a contest can not by settlement and application to make second homestead entry of the land defeat the preference right of the successful contestant, yet where the contestant has transferred all his right and interest in the land, the right of the entryman under his settlement and application is superior to and will defeat an attempted location of soldiers' additional right in the name of the contestant but in fact in the interest and for the benefit of the transferee.

PIERCE, *First Assistant Secretary*:

September 26, 1902, Matt Nauha made homestead entry, No. 17550, at Duluth, Minnesota, for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and

the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of Sec. 11, T. 64 N., R. 13 W., 6th P. M. August 31, 1907, an affidavit of contest was filed against this entry by William H. Smallwood, in effect charging that Nauha had never resided upon or cultivated any of the land. After a hearing upon this contest, the register and receiver, June 18, 1908, rendered a decision, in which they found that the charges of the contest affidavit had been substantiated, and, further, that the land had been wholly abandoned by the entryman for at least one year prior to the filing of the contest affidavit. Upon appeal, this was affirmed by the Commissioner of the General Land Office January 29, 1909, and by the Department May 28, 1909. A motion for review being denied July 29, 1909, the decision became final, and the entry was canceled by the Commissioner August 4, 1909.

August 10, 1909, the entryman filed his application to make second homestead entry of the land under the act of February 8, 1908 (35 Stat., 6), in which he also stated that he received no consideration for abandoning or relinquishing his entry. This application was suspended by the register and receiver pending an exercise by Smallwood of his preference right of entry. September 9, 1909, Smallwood filed his applications as the assignee of John W. Pennington, deceased, to make soldiers' additional homestead application under sections 2306 and 2307, Revised Statutes, No. 07456, for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and No. 07457, for the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ . November 9, 1909, Nauha filed a protest against the allowance of the soldiers' additional homestead application. The material portion of this protest is as follows:

1. This protestant has a pending homestead application for this land and other land under the act of February 8, 1908, 36 L. D., 291.
2. No notice as required by law has been posted on the above tracts of land or either of them and any affidavits pretending to show that such posting was done is contrary to the fact.
3. No publication showing the pendency of said applications has been made in any newspaper as required by law.
4. At the time when said Smallwood applied for the lands in question he applied under a pretended preference right. He had at said time no preference right, because he had in fact sold and assigned any right he might have in said land to the Sheldon-Mather Lumber Co. of Duluth, and at that time this protestant was an actual occupant of the land and had his home thereon and had a pending application therefor. The apparent application by said Smallwood was in fact for last named company.

His application to make second homestead entry is accompanied by an affidavit in which he states that he has lived upon the land with his family for one year prior thereto.

The Commissioner, by his decision of July 6, 1910, dismissed the protest, from which action an appeal to the Department was duly filed.

Paragraph three of the protest refers to the fact that an error of description was made in publishing notice of the additional application No. 07456. As to paragraph two, there is a conflict in the allegations of the two parties as to whether the notice was posted upon the land in controversy or not. Neither of these two allegations is at present material, and even if the applications were defective in that respect, the defects were such that they could be remedied.

It is well settled that a successful contestant may, in the exercise of his preference right, offer a soldiers' additional homestead application for the land, and also that an agreement to transfer title to land acquired by means of a soldiers' additional homestead application prior to the making of such application is valid. It is further well settled that a soldiers' additional homestead application can not be made for land in the actual possession of a qualified settler who has made improvements thereon, except by a successful contestant in the exercise of his preference right. It is also well settled that the preference right of entry of a successful contestant is personal to himself, and not transferable; that any transferee under an attempted transfer thereof acquires no right against an intervening applicant or adverse claimant.

Applying the above principles to the present case, it is apparent that if the allegations of the protest are true, Nauha was in actual possession and living upon the land at the time of filing the soldiers' additional homestead applications, and had applied to make second entry thereof. He was entitled to make second entry under the act of February 8, 1908, as he had, as found by the Department, abandoned his former entry long prior to the passage of the act. Such settlement and prior application would not avail him as against the successful contestant. If the allegations of the protest are true, the successful contestant had transferred any right or interest that he might have had in the land prior to the filing of his additional homestead applications to the Sheldon-Mather Lumber Company. It is apparent that if the soldiers' additional applications were made in the name of the Sheldon-Mather Lumber Company, such company would not succeed, in the face of Nauha's settlement upon and occupancy of the land, and in the face of his prior application therefor. In substance, the transaction is, therefore, an attempt by the Lumber Company to purchase Smallwood's right of entry and exercise it; but by such purchase they can acquire no rights as against a prior applicant for the land. While the transaction is now conducted in the name of Smallwood, the real party in interest, according to the protest, is the Lumber Company.

The decision of the Commissioner is accordingly reversed, and the matter remanded, with instructions that a hearing upon the protest proceed.

## SAM W. JOHNSON.

*Decided January 21, 1911.*

## PASTURE RESERVE LANDS—HOMESTEAD PROOF—RESIDENCE.

In making proof under section 24 of the act of May 29, 1908, on homestead entries of pasture reserve lands in the former Kiowa, Comanche, and Apache Indian reservations, opened under the provisions of the act of June 5, 1906, credit for constructive residence may be allowed, not exceeding six months, between the date of entry and date of establishment of residence, and the remainder of the ten months' period of residence fixed by said section need be only of the character exacted in cases of five-year proof—that is, it need not necessarily be strictly continuous.

*PIERCE, First Assistant Secretary:*

April 17, 1907, Sam W. Johnson made homestead entry for the SE.  $\frac{1}{4}$  of Sec. 9, T. 3 S., R. 15 W., I. M. Commutation proof was submitted upon said entry June 22, 1908, and on July 1, 1908, final cash certificate was issued. Said land is a part of "big pasture" opened under the act of June 5, 1906 (34 Stat., 213), and departmental regulations of October 19, 1906 (35 L. D., 239), being a part of the former Kiowa, Comanche, and Apache Indian reservations. Johnson submitted his bid for this tract of land under the said regulations on December 6, 1906, bidding \$1100, and he was accordingly awarded right of entry.

September 3, 1908, the Commissioner directed proceedings against the said entry based upon an adverse report by a special agent upon the following charges:

(1) That claimant never established and has never maintained residence on said tract.

(2) That more than four months before submitting his commutation proof in support of the said entry, viz., on February 6, 1908, said entryman entered into a contract with one C. A. Swartz, agreeing to sell said entry for towensite purposes.

Hearing was duly had upon the said charges resulting in a decision by the local officers recommending that the proceedings be dismissed, as neither charge had been sustained.

By his decision of June 3, 1910, the Commissioner of the General Land Office reversed the action of the local officers and held the said entry for cancellation. August 29, 1910, the Commissioner denied a motion for review. An appeal from said action has brought the case before the Department for consideration.

Claimant was on September 17, 1907, elected to the office of county attorney for Tillman county, wherein the land in controversy is located. He entered upon his duties as such officer on November 16, 1907. Claimant went to the land about October 1, 1907, to build his house, which was completed about October 10, when he commenced

to reside therein. He remained there with the exception of a few days' absences until just prior to November 16, upon which date he was sworn in and entered upon his duties as county attorney. He married about the last of October and took his wife to the land, where they lived until he commenced his official duties. Thereafter they returned to the land two, three, or four times a month, staying only for a short while on such occasions. He rented the said land to another person who took possession in December, 1907. About 70 acres have been cultivated and the improvements are valued at about \$500. Since proof was made this tract, in connection with other lands, has been developed into a townsite and a large number of people are residing thereon and important business interests have been established there.

Section 24 of the act of May 29, 1908 (35 Stat., 457), reads in part as follows:

*Provided*, That any person who has heretofore entered any of said land under said act of June fifth, nineteen hundred and six, shall receive patents therefor by paying all the deferred installments of purchase money and proving compliance with the requirements of the homestead laws at any time after the expiration of ten months from the date of his entry.

In the Commissioner's decision it is suggested that Johnson knew at the time he made entry that he would be a candidate for county attorney, and that as he was elected prior to the time he established residence he cannot offer his official duties as an excuse for absences from his claim. It should be considered, however, that this claim was initiated when claimant submitted his bid in December, 1906. One-fifth of the highest amount bid for any one tract was required in all cases to accompany the bid, which might include a number of tracts, and which amount was subject to forfeiture in case of failure to make entry of the land awarded to the bidder. Therefore no conclusion of bad faith can well be predicated upon the fact that before the entry was actually made of record the claimant had announced his candidacy for the nomination by his party for the office for which he was afterwards nominated and elected. His status as an entryman should not be considered as different from that of a person not officially employed, but who has been absent at times on account of sickness or to earn money for support or with which to develop the claim. Such absence for short periods would not subject the entry to contest for failure of compliance with law as to residence.

It appears that the Commissioner in his decisions treated this proof under the rules governing commutation proof as to the character of residence required. The act above quoted does not require ten months' actual residence. It simply requires compliance with law for ten months. There is nothing to indicate that the usual allowance of six months for the establishment of residence is to be denied and

neither is it apparent that the residence following the establishment must be of a character different from that required in ordinary five-year proof. In other words, there is nothing in the act to indicate that the ten months' period mentioned therein is a diminution of the fourteen months' period required in commutation proof rather than a diminution of the ordinary five-year period. The Department is therefore of the opinion that the period between date of entry and the date of establishment of residence, not exceeding six months, may be credited in such cases as constructive residence, and that during the remaining part of the ten months' period the residence need be only of the character exacted in cases of five year proof, that is, it need not necessarily be strictly continuous. It is true that according to this construction the matter of residence becomes a negligible quantity. But this appears to have been the will of Congress in the said legislation. These lands were sold at a high price and Congress deemed it advisable to reduce the period of residence required in ordinary cases. By the same act provision was made for the sale of the remaining lands without condition of any residence whatever. It is clear that under this act the most that could be required of this entryman would be four months of actual residence under the most strict construction. Even this would be a negligible period. Therefore, it is plain that Congress considered that title was to be mainly earned by the payment of the purchase price, and it thus made such entries closely akin to cash entries and left little of the homestead feature. This is clearly a remedial act and should accordingly be liberally construed.

In the brief in support of the appeal, numerous cases are cited wherein the Commissioner, it is alleged, took a like liberal view of the law and passed to patent cases no better in residence than this. These cases have not been looked up to test the accuracy of the citation but the Department is convinced that the residence shown in this case is sufficient to meet the requirements of the law. The improvements are likewise sufficient. The remaining question is as to the charge of contracting to sell prior to the making of proof.

No copy of the alleged contract was produced at the hearing, and the claimant positively denied that any contract of the nature charged ever existed. He swore positively that there was no agreement to sell until after the issuance of final cash certificate. The Commissioner in his first decision made no direct finding that this charge had been established but stated that many of the circumstances indicated that there was such a contract, and this, in the view of the Department, is as positive a finding upon this point as the record would justify. Some of the circumstances which it was considered cast suspicion on the claim are the following:

W. G. Roe, a United States Commissioner before whom the proof of Johnson was submitted, stated that C. A. Swartz paid the publication fees and the charges for taking the proof and stated that he would make the required payment of the Government charges at the local land office. The witnesses understood Swartz to state that he had made a loan upon the said land. G. W. Mosby, a notary public, testified that he took the acknowledgment early in February, 1908, of Johnson to a mortgage for the benefit of C. A. Swartz to secure the sum of \$2000. Said witness also stated that he took an acknowledgment to a contract about the same time between Johnson and Swartz but did not remember the nature of said contract. The townsite of Harriston, which is located in part upon this tract, was established early in July, 1908, by said Swartz and others, and a bank was organized about that time and town lots were advertised to be sold early in August. It is also shown that Swartz paid some bills for Johnson in connection with this land.

The only direct finding by the Commissioner in his first decision was as to the residence. He found same insufficient and held the entry for cancellation, as the claimant admitted that since making proof he had sold the land. In his decision on review the Commissioner made no reference to the charge of agreement to sell prior to proof but denied the motion on the ground that bona fide residence was never established by claimant and even if established it was not continued for a sufficient time. In both decisions reference was made to the rules governing commutation proof. As above stated the local officers found that the second charge had not been established. The Commissioner did not positively find that it was proven. The Department finds no clear and convincing proof in support of the charge such as would justify cancellation of the entry. The action appealed from is accordingly reversed.

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FANNY A. SALISBURY.

*Decided January 23, 1911.*

RESURVEY OF IMPERIAL VALLEY LANDS—ACT OF JULY 1, 1902.

While the act of July 1, 1902, providing for the resurvey of certain townships in Imperial Valley, California, contemplates that the lands occupied by settlers and described according to private surveys should be recognized and marked by an official survey, it does not contemplate a departure from the established system governing the surveys of public lands or recognize any irregularity of survey, and where conflicts are unavoidable the lines of the different claims should be so adjusted as to produce the least inequality between the several claims.

PIERCE, *First Assistant Secretary:*

This appeal is by Fanny A. Salisbury from a decision of the General Land Office rejecting her application to have survey of tract 67,

in T. 18 S., R. 12 E., Los Angeles land district, California, so amended as to include a strip of land alleged to have been illegally omitted from tract 67 and included in tract 66, adjoining on the north.

It is alleged by appellant that the north boundary of the land claimed and occupied and cropped by her for the past six years is marked by a fence which has always been accepted by abutting owners as a true line of her claim; that the strip of land which has been included in tract 67 on the south end is not now and never has been occupied or claimed by appellant.

The survey complained of was made under authority of the act of July 1, 1902 (32 Stat., 728), which authorized the Secretary of the Interior to cause to be made a resurvey of the lands in Ts. 13 to 16 S., Rs. 11 to 16 E., inclusive, known as the Imperial Valley, California, which provided:

That nothing herein contained shall be so construed as to impair the present *bona fide* claim of any actual occupant of any of said lands to the lands so occupied.

The government surveys, which were extended over these townships in 1855 and 1856, were found upon examination to be very irregular. About 1900 this section of country was occupied by land companies with a view to reclaiming the lands by irrigation and to induce settlers to occupy them. At that time the corners of the public land surveys had been so far lost and destroyed as to render it difficult, if not almost impossible, to trace the subdivision of even township lines. Private surveys were therefore resorted to and all claimants and settlers occupied and described their claims according to the lines of those private surveys. The Imperial Land Company was one of the companies engaged in promoting the reclamation of that section and caused to be made the private survey of the claim in question.

It was soon discovered that conflict between the different surveys and with the government survey was so great as to be irreconcilable. That led to the passage of the act of July 1, 1902, *supra*, which contemplated that the lands occupied by settlers and described according to the private surveys should be recognized and marked by an official survey.

That is clearly manifested by the express terms of the proviso that no *bona fide* claim of any actual occupant to the lands so occupied shall be impaired by the resurvey. It did not, however, contemplate a departure from the established system governing the surveys of public lands or recognize any irregularity of survey. Where conflicts are unavoidable the lines of the different claims must be so adjusted as to produce the least inequality between the several claims. That seems to have been the purpose that controlled the deputy surveyor in shifting the north line of this claim a short



distance south and adding to it a corresponding area on the south boundary, thus securing to all the claims the prescribed areas, except as to the north tiers of subdivisions to which are always added or taken from any excess or deficiency in measurement.

The contention of appellant that the north boundary of tract 67, which she entered according to the private survey as the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 1, in said township, has been located 196 feet south of the locus of the north boundary of her possession, as shown by her fence and by the line of the private survey, may be conceded, but it does not follow that the deputy surveyor did not comply with his instructions or that he violated any provision of the act of July 1, 1902. Tract 67 has been surveyed in the form and substantially according to the lines indicated by the private survey as the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  of said section 1.

The decision of the Commissioner is affirmed.

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COAL LANDS—AGRICULTURAL ENTRIES—ACT JUNE 22, 1910.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington D. C., January 23, 1911.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE,

SIR: Paragraph 2 of the regulations issued September 8, 1910 (39 L. D., 179), under the act of June 22, 1910 (36 Stat., 583), is hereby modified to read as follows:

The act applies to unreserved public lands of the United States in those States and Territories in which the coal land laws are applicable, exclusive of the District of Alaska, which have been withdrawn from coal entry and not released therefrom, or which have been classified as coal lands or which are valuable for coal, though not withdrawn or classified.

You are instructed to reconsider all cases in which action has been taken adverse to applicants or entrymen pursuant to that part of said paragraph which is eliminated by this order, unless otherwise foreclosed.

Very respectfully,

R. A. BALLINGER, *Secretary.*

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STATE OF WASHINGTON *v.* NORTHERN PACIFIC RY. CO.

*Decided January 23, 1911.*

STATE SELECTION—SETTLEMENT CLAIM—RELINQUISHMENT.

By acquiescing in departmental decision in the case of Homestead and Timber Land Claimants *v.* State of Washington, 36 L. D., 89, the adjudication therein against the claim of the State under its selection and in favor of the prior settlers became final and fixed, and the State thereafter had no right by virtue of its selection that would attach upon relinquishment of the settlement claim; but the land thereupon became subject to appropriation by the first legal applicant.

PIERCE, *First Assistant Secretary*:

The State of Washington appealed from decision of the General Land Office, July 6, 1910, rejecting its indemnity school selection for E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 24, T. 25 N., R. 13 W., and lots 1 and 2, Sec. 19, T. 25 N., R. 12 W., Seattle, Washington.

July 13, 1905, the township plats were filed in the local office; July 12, 1905, Eric Spencer applied for homestead entry for these lands, alleging settlement prior to filing township plats. The application was suspended to wait the State's preference right under act of March 3, 1893 (27 Stat., 593). September 9, 1905, within its preference time, the State filed its indemnity selection of these and other lands. September 19, 1909, it relinquished other of its selected lands, but not those in controversy. September 20, 1907, in *Homestead and Timber Land Claimants v. Washington* (36 L. D., 89) it was held that homestead applicants alleging settlement prior to filing of plats of survey were entitled to entry. Spencer was one of the claimants in that case. The State filed no motion for review of that decision.

January 20, 1909, Spencer relinquished his application, and the same day the Northern Pacific Railway Company filed its indemnity list for these lands. The State had in meantime been allowed to file supplemental lists for these lands. October 2, 1909, the Commissioner of the General Land Office, on authority of *Todd v. Washington* (38 L. D., 165), held the railway company's selection for cancellation. April 1, 1910 (38 L. D., 518), the Department, on review, vacated its decision in *Todd v. Washington* and held the State's claim was concluded by its failure to file motion for review in *Homestead, &c. Claimants v. Washington, supra*, as to all tracts for which its selections were rejected. May 9, 1910, the Department, in *Edward B. Crary v. State of Washington* (unreported), a case similar to that now at bar, held that:

The only apparent distinction between this case and that of *Todd* is that Barkley, original settler, claimant for the land involved in that case, made entry, while in this case Rowe, original claimant, apparently did not make entry though his right was established by the decision and the right of the State to select was denied. The State did not move a review, and the decision became final and effectually excluded the land from its list. \* \* \* The difference is not material and does not distinguish the case. When the decision became final, the land was open to the first qualified applicant.

In view of this decision, July 6, 1910, the Commissioner of the General Land Office recalled and vacated his order of October 2, 1909, and rejected the State's supplemental indemnity list. The decision last above cited was upon the precise point here involved.

It is assigned as error of the Commissioner to hold the uncanceled selection list pending was not such segregation of the land as precluded other entry; and in failing to hold that the pending selec-

tion list immediately attached to the land on filing of Spencer's relinquishment.

The present case is not distinguishable from *Crary v. Washington, supra*. By its failure to file motion for review, the adjudication against the State and vestiture of the individual adverse right became final and fixed. Spencer's right, while not perfected by an entry, was adjudicated in his favor, and the State acquiesced therein by failing to ask review. The State's right having been adjudicated and barred, the case became in principle like that of *Perry v. Central Pacific R. R. Co.* (39 L. D., 5); *Nelson v. Northern Pacific Railway Co.* (188 U. S., 108); and *St. P., M. & M. Ry. Co. v. Donohue* (210 U. S., 21). In these cases a settler's right had excluded the land involved therein from the railway grant. Neither the settler nor his heirs in any of those cases pursued and perfected the right which excluded the land from the grant, but waived the right permitting another to appropriate it. There is no essential difference between the condition in those cases and in this. The State's right having been excluded, the land became open to the first legal applicant.

The decision herein is affirmed.

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ARTHUR E. DAY.

*Decided January 26, 1911.*

**DESERT ENTRY—DELAY IN RECLAMATION—EXTENSION OF TIME.**

The construction of an artesian well, with a view to procure water for the reclamation of a desert land entry, is a construction of irrigating works within contemplation of section 3 of the act of March 28, 1908, and failure, after diligent effort, to obtain water by means of such attempted artesian well, without fault on the part of the entryman, is sufficient ground for extension of time as provided by that section.

*PIERCE, First Assistant Secretary:*

January 16, 1905, Golda M. Ewald made desert-land entry number 1881 for the E.  $\frac{1}{2}$  of Sec. 8, T. 16 S., R. 25 E., N. M. P. M., Roswell, New Mexico, land district. August 5, 1906, the entry was duly assigned to Benjamin F. Herring. April 14, 1906, the entry was by Herring duly assigned to George E. Mitchell, and on July 20, 1907, said entry was duly assigned to Arthur E. Day, now appellant.

August 5, 1908, Day addressed a letter to the Commissioner of the General Land Office, omitting formal parts and description of land, as follows:

Reclamation in that vicinity is generally by means of artesian wells which is quite satisfactory on the average. My claim lies near good artesian wells on all sides but after expending over three thousand dollars and going to a depth of more than one thousand feet we failed to get artesian water and

therefore have not the water to irrigate this claim, and further I have not the means at present to undertake another well. I have heretofore met all requirements but now the time limit of four years in which to make final proof will expire in a short time.

The question is, Hon. Commissioner, Am I entitled to an extension of time under act of Congress approved March 28, 1908?

September 9, 1908, the Commissioner replied to said letter, omitting formal parts, as follows:

The facts stated in your letter appear to be sufficient to entitle you to the benefits of the act mentioned, and the records of this office show that the three yearly proofs, showing expenditure for fencing, breaking the soil, and drilling an artesian well, have been made.

If therefore you will file in the local land office, as required by said act, your affidavit, corroborated by two witnesses, and setting forth the facts in the case, particularly the causes which have prevented your completing the artesian well and obtaining a water supply, the matter of granting the extension will be duly considered.

October 9, 1908, Day filed in the local office an application for extension of time for three years within which to submit final proof in support of this entry, in words and figures as follows:

I, Arthur E. Day, of Winfield, Kansas, on my oath state that I am the same person to whom was assigned on July 20, 1907, Desert-Land Entry No. 1881, made on January 16, 1905, by Golda M. Ewald for the East half of Sec. 8 in Twp. 16 S. of Range 25 E., N. M. P. Meridian; that at the time said claim was assigned to me there had been expended in fencing said tract and in the first breaking of 130 acres thereof the sum of \$650.00; and the yearly proofs for the first and second year had been submitted; that on or about August 20, 1907, a contract was entered into between Stephen Payton and myself on the first part, and the Parker Drilling Company of the second part, to drill an artesian well on the SW  $\frac{1}{4}$  SE  $\frac{1}{4}$  of Sec. 8 Twp. 16 S., Range 25 E., said Parker Drilling Company was to commence drilling said well on or about October 1, 1907, and the same was to be completed as speedily as possible; that said company drilled said well to a depth of one thousand feet by January 20, 1908, for which drilling, and for furnishing the necessary casing for said well we paid them the sum of \$3,300.00; that said well was located in the very midst of the artesian well district and is surrounded on all sides by good flowing wells drilled to depths of from 400 to 800 feet, yet our well, being the well under consideration, which was situated on a lower level than the flowing wells nearby, failed to produce flowing water, although drilled to a depth of one thousand feet, which depth is greater than that of any well in that vicinity.

In view of the facts set forth in the foregoing statement, your affiant having exhausted his available means in his efforts to secure water with which to reclaim his said land, now requests that an extension of time of three years be granted him within which to comply with the requirement of the desert-land law as provided by Sec. 3 of the Act approved March 28, 1908.

By the Commissioner's decision of August 27, 1910, the application of Day was denied, and applicant has appealed to the Department.

In denying said application it is said:

The act of March 28, 1908, under which the application is made, authorizes an extension of time for making proof on entries of this kind, where it can be

shown that because of some unavoidable delay in the construction of the irrigating works intended to convey water to the lands involved, the entryman is, without fault on his part, unable to make proof of the reclamation and cultivation of the land. The delay in securing a permanent supply of water does not appear to come within the provisions of this act.

It thus appears that this application is denied upon a holding that the construction of an artesian well for purposes of irrigation is not the construction of irrigating works, intended to convey water upon the land, and that a failure to obtain water by means of such attempted artesian well is not a failure of the entryman without fault on his part, whereby he is unable to make proof of the reclamation and cultivation of the land. No reason is perceived why the construction of an artesian well is not within the contemplation of the act of March 28, 1908 (35 Stat., 52), as fully and to the same extent as the construction of irrigation works by the erection of a dam or the making of a reservoir and ditches upon the land. This case is fairly distinguished from the decision in the case of John S. Tendick (37 L. D., 332).

This entryman seems to have complied with both the letter and the spirit of the law, and his expenditure of \$3,300 in attempting to procure water by means of an artesian well is abundant evidence of his good faith. The Department is of the opinion that he should have further time within which to accomplish irrigation of the tract in question. The full period of extension which may be granted under the law will expire January 16, 1912. It is believed that extension to said date should be granted.

The decision appealed from is reversed, and the case is remanded to the General Land Office for further proceedings in accordance with the views herein expressed.

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HULDA ROSLING.

*Decided January 28, 1911.*

REPAYMENT—RELINQUISHMENT WITHOUT CONTEST.

An entry in good faith relinquished because in conflict with a prior settlement right was "canceled for conflict" within the meaning of section 2 of the act of June 16, 1880, notwithstanding there was no contest to determine the conflicting rights, and the entryman is entitled to repayment of the moneys paid in connection therewith.

PIERCE, *First Assistant Secretary:*

This is an appeal of Hulda Rosling from a decision of the General Land Office of September 2, 1910, denying her application for repayment of the amount paid by her in connection with her homestead entry for lots 1, 2 and 3, SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec.

17, T. 98 N., R. 79 W., 5th P. M., Gregory, South Dakota, land district.

Rosling was allowed to make entry of the tract specified October 7, 1909. On the 12th of the same month she filed a relinquishment thereof, surrendered the duplicate receipt and applied for repayment. On November 3, 1909, George L. Shannon made homestead entry of the same tract.

In her application for repayment the applicant swears that "Prior rights were obtained on the land by another party who squatted on the same," and in a second application that "This land was occupied by a squatter at the time my entry was made. He contested, I relinquished and entered another tract."

Reporting on this application on July 16, 1910, the register states,

I beg to advise that the records simply show that the grounds claimed by the entrywoman, Rosling, was conflict with squatter. It is to be presumed that this is one of the cases of conflict which were so numerous on and after October 1, 1909, incident to the throwing open of Tripp County to general settlement and entry. In many cases the parties, the entryman and the squatter, got together and made a settlement of rights without ever filing a contest affidavit, which is no doubt the case in the instance at hand. It seems that Rosling was assigned a number and had to wait some days before being allowed to file, and if Shannon had wished to contest we would have ruled him in the same manner.

In support of her application for repayment, Rosling filed the affidavit of Shannon that prior to making his entry on November 3, 1909, he had established residence on the land and claimed it by right of prior settlement. He further swears—

I established residence on this land on the 1st day of October at 12 o'clock, and on or about the tenth day of October, 1909, Grant Dick came to the claim for the purpose of building a house upon it, for his sister-in-law, Hulda Rosling who had filed on this land. He finding the place occupied by myself and another squatter who was also claiming the land offered me fifty dollars to get off the place and give him possession. Which offer I refused, informing him that I had legal right to the land and expected to hold it against all entries and all occupants. On November 3d when I went to the land office to file I found Hulda Rosling had relinquished her entry. This relinquishment was filed without her receiving any consideration from me or any one representing me.

The General Land Office rejected the application for repayment, holding that—

Under the ruling in the Cloninger case (28 L. D., 21), it is necessary, in order to establish right to repayment based on conflict, that such conflict be judicially determined, unless, of course, the fact of conflict is a matter of record.

From this action appeal is taken to the Department.

The claim for repayment is to be considered under section 2 of the act of June 16, 1880 (21 Stat., 287), which provides for such re-

payment in cases where homestead entries have been "canceled for conflict," or where the entry has been erroneously allowed and cannot be confirmed.

The ruling of the Department in the Cloninger case, cited in the decision of the General Land Office, does not warrant the interpretation there placed upon it. While in that case the conflicting claims of the settler and the entryman had been determined by a contest properly initiated and prosecuted to the conclusion of a cancellation of the entry, it was not held in said decision, specifically or by reasonable implication, that repayment could not have been made, for conflict, if the contest had not been brought or had not been decided. No reported case is found in which the Department has gone to the extent of ruling that repayment, based on conflict, cannot be made unless such conflict had been "judicially determined." To so hold would be to encourage litigation, costly to claimants, also to the Government in the time consumed therein, and to discourage the amicable adjustment of conflicting claims. If Congress had intended the repayment act should receive such restricted application it would no doubt have expressed such intention by the use of the word "contest" which had a well understood meaning in the enactment as well as in the administration of the public land laws. It must therefore be presumed that when the Congress provided for repayment in cases of "conflict," it did not intend to require that such conflict must necessarily have assumed the form of a "contest," either initiated or prosecuted to a determination.

In the case of William Hoople, decided by the Department April 17, 1902 (not reported), wherein repayment was allowed upon a showing of record that the claimant therefor had relinquished his first entry and had been allowed to make a second because of conflict between his original entry and a settlement right, it was said:

As the entryman was thus permitted by your office to make a second entry upon the express finding from the record that his first entry was in conflict with a prior settlement right and canceled for that reason, it was immaterial that this finding was not the result of a hearing regularly had in the case. It has otherwise been sufficiently shown and determined that there was such a conflict, within the meaning of the repayment statute, as would preclude the confirmation of the entry.

This ruling was followed in subsequent unpublished cases.

In the present case it appears that while Rosling was in line, at the local office, waiting her turn to make entry of the land, Shannon made settlement thereon; that a few days after she made entry the agent sent by Rosling to build her house found Shannon on the land and attempted to get him to leave; that Shannon refused, declaring his right to the tract by reason of his settlement and his intention to hold it against all claimants; and that because of the conflict in their

interests thus disclosed and in recognition of Shannon's superior right, Rosling relinquished her entry. Such relinquishment was not voluntary.

It further appears from an examination of the records of the General Land Office, that Rosling was allowed to make a second entry at the Gregory office November 18, 1909, "by reason of conflict with prior squatters' rights," as shown by endorsement on her application. This in itself was a determination that Rosling's original entry was, in fact, canceled for conflict.

The entry here under consideration was canceled because of conflict, within the meaning of the act of June 16, 1880, and there is no reason to doubt the entire good faith of Rosling in the transaction. She is, therefore, entitled to repayment as applied for, if no reason exists other than that for which her application was denied.

The decision appealed from is accordingly reversed.

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#### INSTRUCTIONS.<sup>a</sup>

##### FORFEITURE OF RIGHTS OF WAY—PROSECUTION OF JUDICIAL PROCEEDINGS.

Directions given that proceedings in the name of the United States, at the instance of a petitioner, to secure judicial declaration of forfeiture of rights of way for nonperformance of conditions subsequent, under the regulations of January 6, 1906, be instituted and prosecuted by United States District Attorneys, and that indemnifying bonds to cover costs, required by such regulations, be dispensed with.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, January 29, 1909.*

In reply to a recommendation made by this Department to the Attorney General that the Millard County Land and Water Company be allowed to institute suit, in the name of the United States, to secure judicial declaration of forfeiture of rights of way granted to David Crafts and O. N. Parsons, respectively, for reservoirs in the Salt Lake City land district, Utah, acquired under section 20 of the act of March 3, 1891 (26 Stat., 1095, 1102), the Attorney General states, in a letter to this Department of January 26, herewith enclosed [see 39 L. D., 481], that it is deemed preferable that such suits should be instituted and carried on by the proper United States District Attorneys, and that the bonds, heretofore tendered by the petitioners in such cases, to indemnify the United States against liability for costs, are considered by him to be of no benefit to the Government, as no such judgment could, in any event, be rendered in such suits against the United States.

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<sup>a</sup> Omitted from Volume 37.



You will accordingly discontinue the practice of requiring such bonds from future petitioners, and so modify the practice under the regulations of January 6, 1906 [34 L. D., 358], as to conform to the views of the Attorney General, as expressed in his letter of January 26, aforesaid.

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OPINION.

DEPARTMENT OF JUSTICE,  
*January 26, 1909.*

THE HONORABLE

THE SECRETARY OF THE INTERIOR.

SIR: The receipt of your letter dated January 20, 1909, relative to a proposed suit in the name of the United States to secure a judicial declaration of the forfeiture of certain grants of right of way to David Crafts and O. N. Parsons, respectively, for reservoirs in the Salt Lake City land district, Utah, acquired under section 20 of the act of March 3, 1891 (26 Stat., 1095, 1102), is acknowledged.

The records of this Department show that there has been a diversity of practice during the past few years in reference to the institution of suits under this provision of law, some of said suits being instituted by the respective United States District Attorneys, and others by attorneys representing parties in interest who have been appointed Special Assistants to the Attorney General for the purpose of instituting such suits. Inasmuch as these suits must be brought in the name of the United States, and as the statutes make it the duty of the United States District Attorneys to institute all suits in which the United States is in anywise interested, it is deemed preferable that these suits should be instituted and carried on by the proper United States District Attorneys. It is apparent that the bonds which have been tendered in these cases could be of no benefit to the United States, as they are conditioned that the principal in said bonds "shall pay all costs or judgment for money that may be awarded or rendered against the United States on account of said suit." No such judgment could in any event be rendered in such a suit against the United States.

Accordingly the petition filed by the Millard County Land & Water Company and transmitted by you with your letter dated January 5, 1909, to institute suit to secure a declaration of forfeiture of the rights granted to Crafts and Parsons, has been this day transmitted to the United States Attorney for the district of Utah, with instructions to investigate the facts in the premises and if, in his judgment, the suit requested can be maintained, to institute the same.

Very respectfully,

CHARLES J. BONAPARTE,  
*Attorney General,*

HEIRS OF IRWIN *v.* STATE OF IDAHO ET AL.

Motion for review of departmental decision of September 23, 1909, 38 L. D., 219, on behalf of the State of Idaho, denied by First Assistant Secretary Pierce, February 1, 1911, on authority of the opinion of the Attorney-General of January 30, 1911, as follows:

**BOISE NATIONAL FOREST—PREFERENTIAL RIGHT OF SELECTION BY STATE.**

## OPINION.

## DEPARTMENT OF JUSTICE,

*January 30, 1911.*

SIR: By my opinion of September 15, 1909 (27 Op., 605, 38 L. D., 224), you were advised that certain lieu selections of public land attempted by the State of Idaho pursuant to its application for survey made under the act of August 18, 1894 (28 Stat., 394), were defeated by a proclamation of the President, promulgated after the application but before the survey and selection, and including the lands in question within the limits of the Saw Tooth (now Boise) National Forest (34 Stat., 3058). The details of the various proceedings taken, as well as the statutory provisions involved, were set forth fully in the opinion and need not be here repeated. I there held, in substance, first, that the State's application was not a "filing" within the meaning of the exception in the proclamation, and second, that the steps which had already been taken by the State when the proclamation was issued fell short of creating any vested right as against the United States. Thereupon you rendered a decision adverse to the selections (38 L. D., 219). As appears by correspondence since addressed by you to me, the attorney-general of Idaho, at a further hearing allowed by your office, has again urged that the selections should be approved for reasons which, he strongly insists, have not heretofore been given due consideration, in view of which you inquire whether I desire to adhere to my opinion.

The main argument of the State, as revealed by the briefs transmitted by you, is twofold. First, it is contended, contrary to the conclusion reached in my former opinion, that it was not the intention of the proclamation to abridge or destroy any opportunity which the State might otherwise have enjoined to select or acquire, after survey, any of the lands described in its application.

The other and more important contention is to the effect that a contrary purpose, if entertained by the President, would be violative of the law.

The first proposition is based upon the concluding portion of the proclamation, which reads as follows:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made.

The contention here is that the State's application for survey was "a lawful filing duly of record in the proper United States Land Office," and was therefore protected by this saving clause. Of course the application, having been filed pursuant to law in a public office, may be spoken of in a generic way as a "filing." That, however, is not the sense in which the term is used in the proclamation. In relation to public land matters the word "file" has acquired a definite and well understood meaning of a more narrow scope, denoting the act of lodging with the land-office officials some instrument accompanying and declaring a claim to a definite parcel of land. Thus it is common to say that a claimant has filed on a quarter section of land under the homestead law, referring to the initial homestead application which first manifests of record the existence of his claim to that particular tract. So of applications for specific parcels under other laws. The pervading idea derives its character from the purpose and effect rather than the physical act of filing the instrument. In the usual and generic sense, the term "filing" denotes the act alone and carries not even a suggestion of its purpose or legal significance. The special meaning grew out of the constant association of the act of filing with the making of claims to specific parcels of land under the general land laws. In construing the proclamation it is the fair, and, indeed, the only safe course, to assume that this word, being found in a connection which precludes the generic meaning, was used as it had theretofore been used in its special applications, and with reference to the sort of claims and land-office proceedings out of which its peculiar meaning was derived. To hold that a mere application for a survey under the act of 1894 is a "filing" upon all of the region described in that application would stretch the meaning of the term far beyond its previous conception and would tend toward the destruction of the special meaning entirely. I do not believe that any one would contend otherwise if the application were directed solely to the procurement of a survey. It is the preferential right of selection arising with the application which alone lends color to the effort to characterize it as a "filing." But that is essentially a right to forestall new claims of others until the sections shall have been

identified and the State shall have had its opportunity to examine them, satisfy itself in regard to their value, and applicability to its grants, and thereupon make such selections as it may deem advisable. It does not carry with it any obligation to make any selection, nor any presumption that any of the sections when ascertained will prove to be free from prior claims, or of the character of land which the State is authorized to select. Some or all of the lands may turn out to be mineral lands. Some or all may have been previously settled upon or otherwise appropriated. Yet the application for survey will have covered all of them—those which lie beyond the reach of the State as well as those which when identified it may lawfully acquire should it choose to do so. In no proper sense, therefore, can the State be said to make a claim to the land described, or any part of it, prior to actual selection of specific tracts. Then the list embodying such selections, when filed with the land officers, would doubtless constitute such a “filing” as the proclamation intends.

The conclusion here reached is fortified by the associations of the word “filing” in the proclamation. “Entry” and “settlement” import rights or claims to designated parcels. “Filing,” where it occurs the second time, plainly refers to claims based on settlement. And the *proviso*, that the exception “shall not continue to apply to any particular tract of land, unless the entryman, settler, or claimant continues to comply with the law under which the *filing* or settlement was made,” would appear to place the matter beyond controversy.

The other point—that the proclamation as I have just construed it, would violate the law—is made in part upon the proposition that, with the filing of the application for survey, the lands ceased to be such “public lands” as the President was authorized to reserve (act of March 3, 1891, sec. 24, 26 Stat., 1103); and in part upon the declaration of the act of 1894 that the lands covered by such application “shall be reserved upon the filing of the application for survey *from any adverse appropriation by settlement or otherwise* except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim.” In the latter connection, it is argued that the words “any adverse appropriation” were intended to include an appropriation of public lands by the Government for forest purposes through the action of the President.

The act of 1891 (*loc. cit.*) empowered the President, “from time to time” to “set apart and reserve, in any State or Territory having

public land bearing forests, in any part of the public lands wholly or in part covered with timber," etc., "as public reservations," and directed him to declare by public proclamation "the establishment of such reservations and the limits thereof."

The case does not call for an attempt to define generally what was there intended by "public lands." That is a term which is susceptible of various meanings, according to the connections in which it is found. In the restricted sense in which it is employed in acts looking to the disposition of the title or the granting of privileges—and this is undoubtedly the sense in which it most frequently appears in litigation—it means the lands of the United States which are open to acquisition by the qualified first comer under some one or more of the general land laws—lands which are not withheld from such acquisition by any subsisting right or claim in another, or any act of the Government. In the absence of reasons for a contrary interpretation, this, as has been frequently held, is the meaning which should be adopted; but it is not the only possible meaning. Thus, in the recent case of *Union Pacific v. Harris* (215 U. S., 386, 388) the court said:

The grant of the right of way was "through the public lands." What is meant by "public lands" is well settled. As stated in *Newhall v. Sanger* (92 U. S., 761, 763), "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." . . . If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation.

And in *United States v. Blendaur* (128 Fed., 910, 913), where the Circuit Court of Appeals for the Ninth Circuit decided that lands, formerly part of an Indian reservation, which were by law set apart specially for homestead entry, were nevertheless such "public lands" as the President was authorized to reserve under section 24 of the act of March 3, 1891, it was said:

The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In *United States v. Bisel* (8 Mont., 20, 30; 19 Pac., 251) the court, after referring to the decisions in *Wilcox v. Jackson*, *Newhall v. Sanger*, and other cases, said:

"There is no statutory definition of the words 'public lands,' and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use."

In a broad sense, as the United States can have no property which is not public property (*Van Brocklin v. Tennessee*, 117 U. S., 151, 158), all the lands which it owns are "public lands," whatever, at a given time, may be their status in relation to possible acquisition

of title from the Government. The term "public lands" and the term "public domain," held to be its equivalent (*Barker v. Harvey*, 181 U. S., 481, 490), exist in many provisions of law, civil and criminal, the purposes of which have obviously no relation whatever to any change of title. Take, as one instance only, the provisions against willfully setting out or leaving fires on the "public domain" (Penal Code, secs. 52, 53; 29 Stat., 594; 31 Stat., 170). Does any pressing reason suggest itself why this legislation, though highly penal, should not be held applicable to lands within a forest reservation? And would it be reasonable to say that its application to the lands now in question ceased when the State filed its request to have them surveyed?

Illustrations like this, though not of course conclusive, indicate how unsafe it may be to lay down any hard and fast rule for the interpretation of a term which Congress undoubtedly has used, in the past, and may be expected to use in the future, in varying degrees of significance. Whether these lands, notwithstanding the proceedings taken by the State, are still to be regarded as "public lands" for the purpose of reservation by the President may best be decided, not by resort to a definition or upon any isolated view of that term, but by consideration and comparison of the two enactments involved.

The substantial object of the legislation of 1891, was obviously not to bestow a power or privilege upon the President, but rather to declare a policy which Congress deemed important to the public welfare, and to provide expedient means for its accomplishment. The discretion reposed and the power conferred implied a duty to exercise them; the President came under an obligation to make reservations of suitable land whenever and wherever, in his judgment, they should be made to carry out the general plan of Congress—a plan of which this executive participation was itself a material and important element. A repeal, therefore, in whole or in part, of the authority thus conferred upon the President, could only mean a renunciation in a corresponding degree of the policy of Congress touching forest reservations. And the same may be said of legislation which would render it possible for States to suspend or seriously interfere with the President's ability to set aside forest reservations within their borders. But this is precisely what could be accomplished under the act of 1894 if construed as the State of Idaho believes it should be. By the mere filing of applications and making of publications this important function of the President could be entirely suspended as to vast areas of the unsurveyed public domain for long periods of time. In this way reservations might be defeated upon the very eve of their creation. It is not, of course, to be assumed that the States would deliberately abuse such a power; but, on the other hand, it is not out of the way to suppose that they might exer-

cise it in their own interest so liberally as seriously to handicap the President in his efforts to set apart timbered lands which he believed should be reserved for the federal purpose.

Upon the general principles that acts granting property or privileges are to be strictly construed in favor of the Government (*Dubuque & Pacific R. Co. v. Litchfield*, 23 How., 66, 88), that in the absence of specific language or necessary implication to the contrary, the sovereign is excepted from the operation of general laws, which tend to divest of any right, privilege, title, or interest (*United States v. Herron*, 20 Wall., 251, 263; *Dollar Savings Bank v. United States*, 19 Wall., 227, 239), and that repeals by implication are not favored (*Frost v. Wenie*, 157 U. S., 46, 58); I am obliged to conclude that the legislation of 1894—notwithstanding its evident purpose to realize for the States named the bounties in land which Congress had extended to them, and notwithstanding the general language reserving the areas which they ask to have surveyed from “any adverse appropriation by settlement or otherwise”—was not designed to empower the State to withdraw public lands from the operation of the provisions of the act of 1891, to any extent or in any way not previously permissible.

The act of 1894 was evidently intended, first, to expedite the surveys, so that the lands might be identified for selection, and second, to hold off new claimants (who otherwise might anticipate the States), until the surveys had been approved and the States had enjoyed a reasonable opportunity thereafter to make their selections. It was intended to effect a readjustment of the relations previously existing between the States and other beneficiaries of the land laws, but not to confer upon the States any privilege which they did not already possess to precede the Government in appropriations of land. This view appears to conform entirely with the purpose of the legislation as it was understood by the executive officials who drafted it, and by the Representative who introduced and explained it in its original form (as an amendment to an appropriation bill) and explained it on the floor of the House. (See proceedings and official correspondence, Cong. Rec., vol. 26, pt. 3, pp. 2955–2959; also Senate proceedings, *ib.*, vol. 26, pt. 8, pp. 8020–8021.)

The facts that the State of Idaho expended money to cruise the land and advanced funds for the survey, and that, notwithstanding the proclamation, the survey was proceeded with at the expense of the State, while they help to emphasize the hardship of the situation in which the State has been placed, can not, in my opinion, affect the foregoing conclusions. Undoubtedly any moneys which it paid to the Government or its officials by way of fees, survey expenses, or otherwise, upon the faith of its application, ought, *ex æquo et bono*, to be refunded. I am greatly impressed, also, by the representations

made concerning the disappointment and loss which have come to the State from its inability to obtain the lands which were supposedly granted to it by Congress.

Very respectfully,  
The SECRETARY OF THE INTERIOR.

GEORGE W. WICKERSHAM.

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CURRY *v.* VREEDENBURG.

*Decided February 3, 1911.*

APPLICATION DURING PREFERENCE RIGHT PERIOD—LACHES.

Rights under an application held subject to the preference right of a successful contestant, if not diligently asserted after expiration of the preference right period, will be treated as abandoned in the face of an intervening adverse claim.

PIERCE, *First Assistant Secretary*:

Orville E. Vreedenburg appealed from decision of the General Land Office of August 19, 1910, canceling his homestead entry for S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 31, T. 1 N., R. 13 E., C. M., Woodward, Oklahoma, upon contest of James E. Curry, who claimed right under a prior application.

The land was entered by George Rudder, which entry was canceled February 14, 1907, on the successful contest of W. O. Heaton. February 25, Robert L. Whitehead filed homestead application, and March 2, 1907, James E. Curry filed homestead application, both of which were suspended to await exercise of Heaton's preference right. January 21, 1909, Vreedenburg filed homestead application, which was also suspended to await the prior applications of Whitehead and Curry. Heaton failed to exercise his preference right. July 6, 1909, withdrawal was filed of Whitehead's and Curry's applications; whereupon Vreedenburg's application was allowed of record on that day. August 16, 1909, Curry filed contest affidavit, alleging that:

withdrawal of his suspended application No. 1291, was a forgery and was not signed and acknowledged by him; that he never signed such a withdrawal or any withdrawal to above described land; that he did not know that such an instrument was to be filed, in fact was entirely in ignorance that a withdrawal of his suspended application No. 1291 was to be filed.

After some dilatory proceedings, January 18, 1910, hearing was had on this charge. February 3, 1910, the local office found for Curry and recommended cancellation of Vreedenburg's entry. On Vreedenburg's appeal the General Land Office affirmed that action.

Vreedenburg's defense was based primarily on Curry's laches in pursuing his homestead application, but included denial of the forgery. For all purposes of this decision, it may be assumed that



Curry never executed a withdrawal of his suspended application for the land or authorized anyone to do it for him. He testified that he paid an attorney \$200 to procure for him a clear filing on the land, and he had incurred some additional expense. He was informed, after Vreedenburg's entry, of the filing of a paper purporting to be a withdrawal of his application, and with reasonable promptness after such information employed another attorney, and asked reinstatement of his application and prosecuted it with diligence. Nothing in the evidence would justify reversal of the findings of the local office and the General Land Office in that respect. Vreedenburg states in a letter of March 28, 1910, to the Commissioner of the General Land Office, that he has lived with his family on the land since July 5, 1909; that he paid \$1250 for securing his entry; has cultivated forty acres; and has expended in improvements on the place \$1500. There was no evidence offered at the hearing by Vreedenburg, and these facts are shown only by the allegations of his letter. It is, however, true that the presumptions are in favor of the entry, and until otherwise shown it must be assumed that he made settlement, established residence, and improved the place in faith of his entry. The controlling question then is, was Curry guilty of laches in pursuing his application for homestead entry. The act of May 14, 1880 (21 Stat., 140), gives a successful contestant thirty days from notice of cancellation of the contested entry within which to make entry of the land. The Rudder entry, which Heaton contested, was canceled February 14, 1907. The law was notice to everybody that Heaton had but thirty days from notice of that act of cancellation within which to make his entry. It does not appear in the record when Heaton was notified of such cancellation. But after a reasonable time for the decision to be sent to the local office and notice to be given Heaton, the presumption would be that he was duly notified. It is scarcely possible without fault of the local office that he was not notified within thirty days after February 14, 1907; so it must be assumed that Heaton's preference right expired prior to the middle of April, 1907. Curry appears to have taken no step to inquire whether Heaton had made entry, or had failed to make entry, and there had elapsed before Vreedenburg's entry two years and four months after cancellation of the prior entry. This certainly shows laches on part of Curry in not pursuing his application filed with the local office in March, 1907. In *Moran v. Horsky*, 178 U. S., 205, 208, it was held that:

a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. See among others *Felix v. Patrick*, 145 U. S., 317; *Gallihier v. Cadwell*, 145 U. S., 368, and cases cited in the opinion. There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity.

In *Gallihier v. Cadwell* (145 U. S., 368, 372), distinguishing between limitation and laches, the court held:

The cases are many in which this defence has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them. . . . But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.

Curry asserts that the withdrawal of his claim was a forgery, but does not cure his laches in pursuing it. While he acted with diligence after information that forgery had been committed, he did not exercise diligence in prosecuting his application for entry. In *United States v. Throckmorton* (98 U. S., 61, 65), the court protected an entry, even against attack of the United States, when the charge made was that the entry was founded upon a forgery, and held:

There is also no question that many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of the law—no longer open to inquiry in the usual and ordinary methods.

Other decisions of the court respecting the effect of laches will be found in *Kirk v. Hamilton* (102 U. S., 68, 76); *United States v. Marshall Mining Company* (129 U. S., 579, 587); *Felix v. Patrick* (145 U. S., 317, 331). Upon the same subject the holdings of the Department concur with those of the courts. See *Hook v. Preston* (21 L. D., 374, 377); *Reins v. Montana Copper Company* (29 L. D., 461, 464); *Santa Fe Pacific Railway Company v. Ranklev* (34 L. D., 380).

When Curry filed his homestead application, in March, 1907, he was charged by the statute with knowledge that Heaton's preference right would soon expire. It was his duty to be diligent and prosecute his application for entry with reasonable diligence after Heaton's preference right did expire. Instead of doing so, he remained passive and inert for more than two years and until after another, in good faith, obtained an entry, exhausted his homestead right, and paid the fees therefor. He is in no position at this time to attack that entry.

The decision is reversed, and Vreedenburg's entry will remain intact.

KNIGHT *v.* HEIRS OF KNIGHT.

Motion for review of departmental decision of November 21, 1910, 39 L. D., 362, denied by First Assistant Secretary Pierce, February 6, 1911.

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KINKADE *v.* STATE OF CALIFORNIA.

*Decided February 9, 1911.*

## RETURN OF SURVEYOR GENERAL—CHARACTER OF LAND.

The return of the surveyor general as to the character of land constitutes but a small element of consideration when the question of the true character of the land is at issue.

## SCHOOL INDEMNITY SELECTION—DISCOVERY OF MINERAL PRIOR TO APPROVAL.

No title is acquired under or by virtue of a school indemnity selection until the same has been duly approved and certified, and prior thereto a disclosure that the land is mineral will defeat the selection.

## APPLICATION FOR LANDS WITHDRAWN OR CLASSIFIED AS OIL—PRACTICE.

No specific regulations relative to nonmineral applications for lands later withdrawn or classified as oil having been adopted by the Department, the procedure governing applications for lands subsequently classified or withdrawn as coal, adopted prior to the passage of the acts of March 3, 1909, and June 22, 1910, permitting the issuance of surface patents, should be followed in such cases, so far as applicable; and in case of a protest by a mineral claimant against such nonmineral application, charging the mineral character of the land, the proceedings thereon should be in accordance with the Rules of Practice now in effect relative to contests.

PIERCE, *First Assistant Secretary:*

December 29, 1893, the State of California made indemnity selection No. 253, at Visalia, California, for lots 3 and 4, Sec. 30; lot 2, N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 31; W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 30 S., R. 22 E.; and lot 3, E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 5; W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 8, T. 31 S., R. 22 E., which was approved by the Commissioner of the General Land Office, as to the lands in T. 31 S., R. 22 E., May 1, 1896. June 4, 1909, the lands in T. 30 S., R. 22 E., were classified as oil lands. September 27, 1909, they were withdrawn from all forms of disposal in Petroleum Withdrawal No. 5, and they are now embraced in Petroleum Reserve No. 2 by Executive order of July 2, 1910. March 25, 1910, the Register and Receiver transmitted an uncorroborated protest by George T. Kinkade against the approval of the selection as to the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 30 S., R. 22 E., alleging that said W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  had been located by him on September 25, 1909, as a placer claim, for the purpose of mining thereon for mineral oils, gypsum, asphaltum, and other similar substances. The Register and Receiver recommended the dismissal of this protest, on the ground that it was not corroborated, and did not show a discovery of mineral. May 5, 1910, a corroborated protest was filed in the General Land

Office, in which it was alleged that Kinkade and his associates were engaged in mining massive gypsum from said W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ ; that prior to September 25, 1909, and prior to location, he and his associates made a valid and sufficient discovery of minerals, in paying quantities, and that in addition to its value for deposits of gypsum the land is also valuable as containing producing oil sands, there being a number of producing oil wells in the immediate vicinity. The Commissioner found this protest to be sufficient, and, June 4, 1910, directed the Register and Receiver as follows:

In view of the classification of the lands selected by the State in this list as oil in character, and their subsequent withdrawal from entry as oil lands, and of the specific affidavits that a portion thereof contains valuable mineral deposits, you will allow mineral protestants sixty days in which to serve notice of charges upon the proper state authorities; the State will then be allowed sixty days within which to file affidavits in denial of the oil classification, as a basis for a hearing to determine the present character of the land, in default of which and of appeal the list will be rejected to the extent of the tracts above described. Should hearing be called for you will confer with the Chief of Field Division, your district, in regard to the time and place for hearing, and you will advise mineral protestant thereof, and allow him to appear and submit testimony as to the character of the land covered by his protest. *The supplemental protest is herewith returned for service. . . . Two copies of this letter are enclosed for service.*

Acting upon the above order, the Register, on July 5, 1910, addressed a letter to the protestant, in which, after stating the substance of the protest, he advised the protestant that—

The Commissioner of the General Land Office by his letter "N" of June 4, 1910, having allowed a hearing herein, and said lands having been classified as oil in character and withdrawn from entry as oil land, you will be allowed sixty days from date of receipt hereof in which to serve notice of said charges upon the proper state authorities. The State will then be allowed sixty days within which to file affidavit in denial of the oil classification as the basis for a hearing to determine the present character of the land, in default of which and of appeal the state selection list will be rejected to the extent of the tracts above described.

A copy of said Commissioner's letter is enclosed herewith for service upon the State.

The attorney for the protestant thereupon prepared a notice, dated July 6, 1910, addressed to the Surveyor-General of California, stating the substance of the protest, and advised him that the protest against the approval of the selection was only to the extent of the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 32. The notice concluded:

Said protestant has applied for and has been granted a hearing on said protest after service of this notice, upon the proper state authorities, a copy of such letter of notification of the Register of the Visalia Land Office, being attached hereto.

A copy of the above notice, and of the Register's letter, was personally served upon the Surveyor-General July 8, 1910. It should

be pointed out that no copy of the protest, or of the Commissioner's letter of June 4, 1910, was ever served upon the State, as directed; further, that the notice apparently confined the proceedings to the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , while the Register's letter extended them to all the tracts; and, further, the notice apparently contemplated a hearing after service, while the Register's letter contemplated a hearing only in the event that the State filed an affidavit in denial of the oil classification.

September 13, 1910, the Register and Receiver reported the service of the above notice and letter, and that the State had taken no action. The Commissioner, October 12, 1910, canceled the selection as to all the land in T. 30 S., R. 22 E. October 26, 1910, the State filed a nonmineral and nonoccupancy affidavit, and, on December 9, 1910, an appeal to the Department was filed on behalf of the State and Miller and Lux, its alleged transferees.

Counsel for the protestant have filed a motion to dismiss the appeal or affirm the Commissioner's decision, upon the following grounds:

1. That no notice of the alleged transfer to Miller and Lux, as required by rule 8 1/2, Rules of Practice, then in effect, was filed, and that an appeal in their behalf can not be entertained.

2. That the Commissioner's judgment of cancellation being a final order, no appeal lies therefrom.

3. That the procedure adopted by the Commissioner was correct, and the State having failed to file a denial of the oil classification or an appeal, the judgment of cancellation was proper and should not be disturbed.

The appellant contends that, the land having been returned as nonmineral by the Deputy-Surveyor, the burden of proof was upon the mineral protestant to show that the land was known to be mineral at the time the selection was filed in the local land office; that the proceedings as ordered by the Commissioner were irregular; and that the selection should not have been canceled in the absence of a hearing at which the protestant had met such burden of proof.

No notice of the alleged transfer to Miller and Lux appears to have been filed, but the appeal was also taken in behalf of the State, and the present proceeding will be treated as solely between it and the protestant.

It is undoubtedly true that a judgment of cancellation by the Commissioner, rendered after due service of notice and opportunity to appeal, is final and not appealable; but in the present case, as above pointed out, the service of notice was defective, and its contents were not clear. The judgment of cancellation predicated thereon was erroneous, and the selection must be reinstated.

The question now arises as to whether the procedure adopted by the Commissioner was correct. At the outset, it is well settled that the return of the Surveyor-General as to the character of the land constitutes but a small element of consideration when the question as to the true character of the land is at issue; that no title is acquired under or by virtue of a school indemnity selection until the same has been duly approved and certified, and that prior thereto a disclosure that the land is mineral will defeat the selection. (*Pioneer Midway Oil Company v. State of California*, February 16, 1910; unreported.)

Paragraph 99 of the Mining Regulations provides that the rules of practice will, as far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of land. Paragraph 101, section 2, provides that where lands are returned as agricultural in character, and, against a claimed right to enter them as agricultural, it is alleged that they are mineral, the proceedings will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases. The regulations of June 23, 1910 (39 L. D., 39), relative to state selections, provided, at page 41:

Where lands sought to be selected are alleged, by way of protest, to be mineral, . . . proceedings in such cases will be in the nature of a contest and will be governed by the rules of practice in force in contest cases.

In harmony with the above, it is apparent that if there had been no withdrawal or classification of the land as oil, the proper procedure would require the Register and Receiver to issue a notice of hearing upon the protest, and then proceed as in contest cases. The inquiry now arises as to the effect of the classification and withdrawal of the land by the Government upon such procedure.

No specific regulations relative to nonmineral applications for lands later withdrawn or classified as oil have been adopted by the Department. The conditions surrounding them, however, are analogous to similar applications for lands later classified or withdrawn as coal, and it would seem that the procedure adopted by the Department relative thereto prior to the passage of the acts of March 3, 1909 (35 Stat., 844), and June 22, 1910 (36 Stat., 583), permitting the issuance of surface patents, should govern, as far as they are applicable.

The circular of April 24, 1907 (35 L. D., 681), provided that a copy of the application to make final proof, final entry or purchase, endorsed "coal lands," should be forwarded to the Chief of Field Division, who would thereupon protest the same, and cause a field examination to be made. By circular of December 27, 1907 (36 L. D., 215), it was provided that lands classified as coal are, from the date of such classification, *prima facie* mineral in character, and that where final certificate or its equivalent had not issued prior to date

of such classification, a nonmineral claimant, applicant, entryman or selector would have the burden of proof in a hearing ordered as the result of such field investigation, on a charge that the lands were mineral; otherwise, the burden would be upon the Government to prove that the lands were known to be mineral prior to the issuance of final certificate or its equivalent.

The above provisions, as far as they are applicable, should be followed relative to nonmineral applications and entries for lands later withdrawn or classified as oil. The matter is therefore remanded, with instructions that notice be issued, and further proceedings be had upon Kinkade's protest, under the rules of practice now in effect relative to contests. The proper Chief of Field Division should be notified of any hearing which may be had thereon, in order that he may attend and produce testimony on behalf of the Government, if found advisable. As to the remainder of the selection not embraced in the protest, the Commissioner will direct the proper Chief of Field Division to make investigation, having due regard to the General Land Office Circular of July 9, 1910, relative to cooperation between the field forces of the Geological Survey and the General Land Office, as approved by the Department January 27, 1911, and, upon receipt of the report, take proper action thereon. In the event that a proper notice is filed showing a transfer of the land to Miller and Lux, notice of the proceedings had herein should also be served upon them.

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### MARY WARD.

*Decided February 10, 1911.*

#### REPAYMENT—REJECTED ENTRY—ACT OF MARCH 26, 1908.

An entry canceled for failure to comply with law or upon voluntary relinquishment can not be considered as rejected within the meaning of the act of March 26, 1908, but where an entry void *ab initio* is canceled upon relinquishment filed in response to a rule to show cause why it should not be canceled, it may properly be considered as a rejected entry within the meaning of that act and repayment allowed if no fraud or attempted fraud in connection therewith is found.

#### PIERCE, *First Assistant Secretary*:

Mary Ward has appealed from decision of the Commissioner of the General Land Office of September 28, 1910, denying her application for repayment of the money paid by her in making her desert land entry September 4, 1907, for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 18, and NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 19, T. 11 S., R. 27 E., Hailey, Idaho, land district, which was canceled on relinquishment September 3, 1909, upon being ruled to show cause why the entry should not be canceled except as to 80 acres thereof.

It appears that since August 30, 1890, the claimant has acquired title to 160 acres of land under the timber and stone law and that she had an existing unperfected entry for 80 acres under the homestead law at the time she made the desert land entry. When she made the said desert land entry she was only entitled to enter under any of the agricultural land laws an area equal to the difference between the area of the said entries containing in the aggregate 240 acres and that permitted under the said act of August 30, 1890 (320 acres), which is 80 acres. She actually included 240 acres in her desert land entry, which was 160 acres in excess of that to which she was legally entitled.

It seems that her homestead entry was unperfected at the time she made the desert land entry, and afterwards when she made final proof on her homestead entry she described the different entries made by her, and it was then seen that she had exceeded the area allowed by law. She was accordingly called upon to relinquish all except 80 acres of her desert land entry. She relinquished said entry in its entirety.

In support of her application for repayment she states that she was advised by the clerk of court, who prepared her application papers in connection with her desert land entry, that the timber and stone entry did not enter into the calculation in considering the area which she was entitled to enter. Such was formerly the rule of the Department, an entry under the timber and stone act being considered not an agricultural entry. This rule, however, was changed by circular of instructions of May 4, 1905 (33 L. D., 539). Therefore said desert land entry was illegal to the extent of 160 acres, and it was properly held for cancellation to that extent. But the good faith and absence of intention upon the part of claimant to defraud the Government is not doubted. Her honest intention is indicated by the fact that she included only 240 acres in her desert land entry instead of 320 acres, and by the further fact that she gave full references to her prior entries on the first occasion that required her to describe the entries she had made. The form of affidavit in connection with the desert land entry did not require a description of her prior entries. It simply required a statement as to whether she had acquired title to or was claiming an amount under the agricultural land laws, which with the land applied for, would exceed 320 acres. She stated that she had not exceeded the limit. She had taken account of her homestead entry but did not, under advice, consider her timber and stone entry, and the explanation offered by her is, in view of the former rule of the Department, credible.

Under the rule to show cause the claimant was not required to relinquish her entire entry, but considered as an entirety it was an illegal entry and could not stand as made. It was subject to cancel-



lation as a whole unless the claimant should elect to retain the 80 acres. Finding that the entry could not stand as a whole, the claimant relinquished. It seems clear that repayment should be allowed if statutory authority can be found to authorize it.

Section 1 of the act of March 26, 1908 (35 Stat., 48), provides:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

Good faith being found, it remains to be considered whether we here have a case of rejected application or entry within the meaning of said act. It is somewhat novel to speak of an entry as being rejected. Such term is generally applied to disallowed applications. Where an entry is found to be invalid, the final action taken against it by the Government is termed, in the nomenclature of the Department, cancellation. But the above law speaks of rejected entries and such term is not inappropriate when the purely technical meaning, as understood in the practice of the land department, is not made predominant. The act of cancellation is only the consummation or final step in the process of rejection. When the true facts concerning the claimant's qualifications became known to the Commissioner, he withdrew approval from the entry and rejected same to the extent disapproved. He did what would have been done in the first instance had all the facts been known. Where an entry is canceled for failure to comply with law or upon voluntary relinquishment by the entryman it cannot be considered that such entry is rejected, but where an entry is shown to have been void *ab initio* and for that reason canceled, such entry may properly be considered as a rejected entry within the meaning of the above law, and repayment may be allowed if no fraud or attempted fraud in connection therewith be found.

It appears therefore that this case comes within the law above quoted, and it is directed that repayment be allowed unless other objection, which does not now appear, be found. The decision from which this appeal is taken is accordingly reversed.

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LOUISE H. SPENCER.

Motion for review of departmental decision of December 6, 1910, 39 L. D., 379, denied by First Assistant Secretary Pierce, February 11, 1911.

ALBERT R. PFAU, JR.

Motion for review of departmental decision of November 19, 1910, 39 L. D., 359, denied by First Assistant Secretary Pierce, February 11, 1911.

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McREYNOLDS *v.* WECKEY ET AL.

*Decided February 20, 1911.*

PRACTICE—APPEAL—EFFECT OF FAILURE TO APPEAL.

An appeal by one of the parties adversely affected by a decision of the Commissioner in a case where the interest of each of the several parties to the controversy is separate, independent and distinct from the others, brings the record up only for determination of the rights of the appellant upon the issues presented by the appeal; and parties adversely affected by the decision who fail to appeal within the time prescribed by the Rules of Practice can not, as a matter of right, insist upon further recognition of their claims, upon consideration of the case on the appeal, but by such failure to appeal are deemed to have acquiesced in the decision and their claims will be considered as eliminated from the controversy.

PIERCE, *First Assistant Secretary*:

This motion is filed by Frederick W. McReynolds for review of the decision of the Department of November 18, 1910, awarding the right of entry of lot 19, Sec. 4, T. 57 N., R. 17 W., Duluth, Minnesota, to Granville A. Burns, in the controversy between Rosaline S. Weckey and Granville A. Burns involving their conflicting rights to said lot.

McReynolds complains of the refusal of the Department to consider his claim to said lot because of his failure to appeal from the decision of the Commissioner of the General Land Office adverse to him and holding that his claim to the land, by reason of his failure to appeal, had been eliminated.

June 2, 1903, McReynolds applied to locate the lot in question with Valentine scrip. October 21, 1905, after approval of the township plat of survey, he applied to have his claim adjusted to the legal subdivisions describing the land located as lot 19 in said section 4.

February 8, 1906, he applied to locate said land with soldiers' additional homestead right, which was rejected by the local officers and, at the date of the hearing in this case, hereinafter referred to, his appeal therefrom was pending before the Commissioner of the General Land Office.

His application to locate the land with Valentine scrip was rejected by the local officers for the reason that no affidavit had been filed

therewith showing that the land applied for was not occupied. Their action was sustained by the Commissioner of the General Land Office and the Commissioner's decision was approved by departmental decision of October 30, 1906.

In the meantime, Granville A. Burns, April 1, 1905, filed application to locate said lot while unsurveyed with Valentine scrip, and, on September 8, 1905, after the filing of the township plat of survey, he applied to adjust his location, describing the land by legal subdivisions.

A motion for review of the decision of October 30, 1906, affirming the decision of the Commissioner rejecting his application to locate the land with Valentine scrip, was filed by McReynolds with which he submitted affidavits showing that the land applied for is unoccupied and that Burns had abandoned his settlement right. In consideration thereof the Department, by decision of November 6, 1907, modified its decision of October 30, 1908, so far as to allow a hearing to determine the respective rights of the claimants to said lot; but it was expressly declared that no decision was therein made as to the validity of McReynolds's application, or the effect of the filing of Burns's application to locate the land with Valentine scrip upon the status of the land. Those questions were expressly reserved for decision by the General Land Office upon the testimony taken at the hearing.

In the meantime a controversy was pending between Granville A. Burn and Rosaline S. Weckey as to the boundary of their respective claims to lots 14 and 19 growing out of settlement, improvement and cultivation of said land since 1896. All parties were cited to appear at the hearing before the local officers to submit proofs in support of their claims.

At said hearing, Burns and Weckey appeared and submitted testimony as to their occupancy, cultivation and improvement of said lots since 1896, but McReynolds failed to appear and no testimony was submitted in his behalf. The testimony taken at that hearing shows that in 1892 Burns was residing upon said lot 19 from which he subsequently removed his residence to lot 14, but continued to occupy, cultivate and improve part of lot 19, in connection with his occupancy of lot 14, upon which he was then residing, and other lots, as a homestead settler.

In July, 1895, Burns applied to make homestead entry of said lot 19, with the other lots embraced in his homestead claim, describing them according to the subdivisions that would be indicated if the lines of an old township survey known as the Howe survey were protracted. The subdivision described in that application as the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of the section was approximately the same land as that described by the approved township survey as lot 19. That applica-

tion was rejected for the reason that there were no legal subdivisions of the character mentioned in his application, but it served to indicate the identical land claimed.

The testimony also shows that Harry C. Weckey, husband of Rosaline S. Weckey, occupied that part of lot 19 supposed to be a part of the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  in connection with his occupancy of a part of lot 14 upon which he had his residence and that Rosaline S. Weckey, his widow, continued to occupy said land for sometime after the death of her husband.

That was substantially the finding of the local officers who awarded the right to make entry of all of said lots 14 and 19 to Burns, in accordance with an agreement found to exist between Burns and Weckey as to the adjustment of their respective claims in the event that the north and south quarter-section line should upon the approved survey of the township not agree with the line that had been established by them as the boundary of their claims. As the land was so occupied at the date of McReynolds's application to locate Valentine scrip and also at the date of his application to locate the same land with soldiers' additional homestead right, both applications were rejected subject to his right of appeal.

McReynolds appealed from the finding of the local officers and their decision was affirmed by the Commissioner of the General Land Office, both with respect to the award in favor of Burns to complete his location of the land with Valentine scrip and as to the rejection of the application of McReynolds to locate lot 19 with Valentine scrip and with soldiers' additional homestead right.

From that decision Weckey appealed, but McReynolds did not. When the case was considered by the Department upon the appeal of Weckey, it was determined that Burns had the superior right to enter all of said lot 19 and it was declared that the claim of McReynolds had been eliminated by reason of his failure to appeal from the decision of the Commissioner of the General Land Office, holding that the land was not subject to his application to locate it either with Valentine scrip or with soldiers' additional homestead right.

McReynolds has filed motion for review of that decision, insisting that the appeal of Weckey brought the entire record before the Department and that the rights of all parties thereto were fully protected under that appeal and that his claim to the land should have been passed upon and not considered as having been eliminated by his failure to appeal.

Where a decree or judgment is several and the interest of each party to the controversy is separate, independent and distinct from the others, any party affected adversely by such judgment or decree may appeal therefrom to protect his own interest and, although the entire record is brought before the reviewing tribunal by such appeal,

PROPERTY OF THE  
GENERAL LAND OFFICE

it is only for the purpose of enabling it to determine as to the rights of the appellant upon the issues presented by his appeal. Parties who failed to appeal are deemed to acquiesce in the judgment below and can not be heard on the appeal of others to complain of error in the lower court nor, as a matter of right, to demand relief from the appealed tribunal. *Todd v. Daniel*, 16 Peters, 521; *Gilfillan v. McKee*, 159 U. S., 303; *Alviso v. U. S.*, 8 Wall., 337.

That rule is of general application and the practice of the Department is not an exception; its rules of practice providing that failure to file specifications of errors within the time allowed by the rules will be treated as a waiver of the right of appeal.

In the administration of the laws providing for the disposal of the public lands, whenever a question is presented to the Secretary of the Interior for his determination, he may review, revise, annul, or affirm any and all proceedings in the Department having for their ultimate object the alienation of any portion of the public lands and determine every question presented by the record of the case irrespective of the manner or mode by which the case is presented for his determination. But that grows out of his power of supervision over the subject matter to see that no portion of the public lands is disposed of to a party not entitled to it, and that the law shall be so administered as to preserve all rights of private parties as well as of the public, whether it is called to his attention by formal notice or by appeal. *Pueblo of San Francisco* (5 L. D., 483, 494); *Knight v. Land Ass'n.* (142 U. S., 161, 178); *Doll v. Jones* (34 L. D., 82).

For such purpose the entire record is brought before the Secretary for his examination in every case, whether it is upon appeal of one or more of several parties to a controversy affecting the disposal of the public lands. But a party to such controversy who fails to appeal from a decision adverse to him and within the time prescribed by the rules can not, as a matter of right, insist upon further recognition of his claim, and, by such failure to appeal, he will be deemed to have acquiesced in the decision of the Commissioner and his claim will be considered as having been eliminated from the controversy.

While Mr. McReynolds is not entitled, as a matter of right, to file a motion for review of the decision of the Department of which he now complains, having failed to appeal from the decision of the Commissioner of the General Land Office adverse to him, his motion may be treated as a petition for the exercise of the supervisory authority of the Secretary, if it were shown that the law had not been properly administered and that he had the prior right to the land which would have been awarded to him upon proper administration of the law.

No such case, however, is presented by this record. There never was a time from the presentation of either of his applications that

the land was subject thereto, it having been at the time of the presentation of his application to locate it with Valentine scrip and at all times since in the occupation of Burns or Weckey, who were residing upon or cultivating, each his portion of the lot claimed, and at no time since has the land been unoccupied.

While the occupancy of either Burns or Weckey was sufficient to prevent the location of the lot by McReynolds during such occupancy, either of them could thereafter have located the land with scrip and their renunciation of their right as homestead settlers and the location of the land with scrip did not cause McReynolds's application to attach or inure in any manner to his benefit. The motion is denied.

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LAUREL L. SHELL.

*Decided February 21, 1911.*

RECLAMATION HOMESTEAD—ADJUSTMENT OF ENTRY TO FARM UNIT.

Where a portion of a homestead entry made subject to the provisions of the reclamation act is subsequently eliminated from the project, and the portion remaining within the project is designated as a farm unit, the entryman may retain either the farm unit or the portion lying without the limits of the project, at his election, and the entry will be canceled as to the remainder.

EQUITABLE ACTION SUGGESTED.

In view of the equities in this particular case, direction is given that if the entryman so desires the portion of the entry eliminated from the project may be again brought thereunder and added to the farm unit with a view to permitting him to complete entry for the entire tract.

PIERCE, *First Assistant Secretary*:

Appeal is filed by Laurel L. Shell from decision of July 19, 1910, of the Commissioner of the General Land Office on motion for review of his decision of March 8, 1910, adhering to the latter, with reference to the homestead entry made by said Shell May 16, 1905, for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18, and lot 3, Sec. 17, T. 34 N., R. 27 W., W. M., Waterville, Washington, land district, relinquished as to the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of said section 18 on October 28, 1907.

Final proof was submitted herein March 8, 1909, and certificate issued March 12, 1909. In said decision of March 8, 1910, the Commissioner accepted said final proof, but held the certificate for cancellation, for the reason that said entry was made subject to the provisions of the act of June 17, 1902 (32 Stat., 388), under which act these lands were withdrawn under the second form April 20, 1903, in connection with the Okanogan Project.

Subsequent to the said decision of March 8, 1910, a farm unit plat was received in the General Land Office, approved by the Secretary

February 28, 1910. Said plat shows said NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of section 18 as farm unit "J," containing 18 acres of irrigable land. On March 23, 1910, said lot 3 of section 17 was released from said withdrawal and restored to the public domain.

The decision appealed from requires the entryman to conform his entry either to said farm unit "J" or to said lot 3, relinquishing as to the other. It is also held in said decision that if the entryman is dissatisfied with the size of the farm unit assigned to him he may protest against same and the protest will be transmitted to the Director of the Reclamation Service for investigation and report. He was allowed sixty days within which to elect and relinquish, and to appeal to the Secretary in the premises.

It is contended in the appeal that the reclamation act contemplates an entry of 40 acres of irrigable land and that the entryman should be allowed to maintain his entry as to both said farm unit "J" and said lot 3.

It is shown by report of a special agent herein that all of entryman's improvements are located upon said lot 3 and are valued at \$2,000, and that the only improvement on said unit "J" consists in some fencing and 15 acres of plowing. The final proof values the improvements at from \$1,350 to \$1,500.

There is no law allowing this entryman to retain both said NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of section 18, constituting unit "J," lying within the reclamation project, and said lot 3, lying without the same. His entry was made subject to all the provisions, conditions, and limitations of the reclamation act, and it is held that where a homestead entry within a reclamation project is divided into farm units, an entryman is entitled to retain only one of said units, to be designated by him, and that the entry must be canceled as to the remaining unit. (Sarah S. Long, 39 L. D., 297). The fact that part of the entry made herein, namely, said lot 3 of section 17, now lies without the limits of the reclamation project, does not change the application of this rule.

The fact that but 18 acres of said unit "J" are irrigable does not invalidate that unit as fixed and approved by the Secretary. Said reclamation act provides that the Secretary shall give public notice of lands irrigable "and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question." It is also provided in said act that the minimum area of an entry under said act shall be 40 acres; but while an entry may not under the provisions of that act be less than 40 acres, the farm unit area rests in the discretion of the Secretary, and when such discretion is exercised by him the area thus fixed for the unit becomes, by express provision of the law, the only area of entry thereunder.

In view of the equities presented in this case, the Reclamation Service has been called upon for a report as to the irrigable area in said farm unit "J," and the Director reports that the lands within the Okanogan Project are valued at from \$100 to \$300 an acre; that the building charge was \$65 per acre, with a rebate of \$6 to \$10 per acre to certain owners constructing their own works; and that the lands of this entry can not be released without loss to the project. He states also that the order of restoration affects only the lands of this entry, and suggests, in view of that fact and of the equities of the case, the revocation of said order and amendment of farm unit "J" to include said lot 3, if the entryman be willing.

No reason appears why this suggestion may or should not be adopted, no adverse claim appearing, and the entryman having made valuable improvements on said lot 3 in good faith expecting that the farm unit when established would include same. The decision appealed from is therefore modified; and if Shell signifies his willingness to accept amendment of said farm unit "J" as suggested, said order of restoration will be recalled and such amendment made, whereupon he may complete his entry accordingly.

#### INSTRUCTIONS.

##### RECLAMATION HOMESTEAD—ASSIGNMENT—MARRIED WOMAN—ACT JUNE 23, 1910.

A married woman may, under the act of June 23, 1910, take an assignment of a homestead entry made under the reclamation act, upon which satisfactory final proof has been made, showing residence and cultivation for the required time, but upon which not all of the water-right charges have been paid, provided the laws of the State or Territory in which the entry is located permit a married woman to purchase and hold real estate as a *femme sole*; but she will be required to show, in addition to the usual requirements in such cases, that the purchase is made with her own separate money, in which her husband has no interest or claim; that the assignment is not taken for the use or benefit of her husband and that she has no agreement or understanding by which any interest therein will inure to his benefit; and that the water-right thus sought by assignment, together with such other water-rights as may be already held in possession by such assignee, will not aggregate water-rights for more than 160 acres of land, furnished under the reclamation act.

*Secretary Ballinger to the Director of the Reclamation Service,  
February 21, 1911.*

The Department is in receipt of your communication of February 11, 1911, requesting advice as to whether a married woman may take an assignment of a homestead entry made under the reclamation act, upon which satisfactory final proof has been made, showing residence and cultivation for the required time, but upon which not all of the water-right charges have been paid. You recite that the particular



case about which inquiry is made arose in the State of Idaho, and that under the laws of that State a married woman may hold, own, and control real property when same is her separate property, acquired by her prior to marriage, or afterwards acquired by gift, bequest, or descent, or purchased with the proceeds of her separate property.

The act of June 23, 1910 (36 Stat., 592), reads as follows:

That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided*, That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.

In the Sarah S. Long case (39 L. D., 297) it was held that—

To entitle one to take by assignment under the act of June 23, 1910, he must show that he has not acquired title to and is not claiming any other farm unit or entry under the reclamation act.

See also instructions of December 17, 1910 (39 L. D., 421), issued under said act.

The theory upon which a married woman is denied the right to make an ordinary homestead entry, except in particular cases where she is shown to be the head of a family, is that she is not free to select and maintain a residence separate and apart from her husband, and that he is to be recognized as the head of the family entitled to determine and establish their domicile. See cases of Bush *v.* Leonard (25 L. D., 129) and Case *v.* Kupferschmidt (30 L. D., 9).

But the law and the rules concerning residence have no application to the class of cases here under consideration, because the said act of June 23, 1910, provides that proof of the full statutory period of five years' residence must be made before an entry becomes assignable thereunder. Therefore it appears that there would be no more reason to deny the right of a married woman to take assignment under the act than there would be to deny her right to make other classes of entries under other public-land laws not requiring residence, such, for instance, as desert-land entry or timber and stone entry, which she is permitted to make. It is therefore held that a married woman may take assignment under the said act, provided the laws of the State or Territory in which the entry is located permit a married woman to purchase and hold real estate as a *femme sole*, but in addition to the other requirements contained in the said instructions of December 17, 1910, she will be required to make affidavit to accom-

pany the assignment, showing that the purchase is made with her own separate money, in which her husband has no interest or claim; that the assignment is not taken for the use or benefit of her husband, and that she has no agreement or understanding by which any interest therein will inure to his benefit; and that the water right thus sought by assignment, together with such other water rights as may be already held in possession by such assignee, will not aggregate water rights for more than 160 acres of land, furnished under the reclamation act.

**RESIDENCE—EXTENSION OF TIME—LEAVE OF ABSENCE—ACT FEBRUARY 13, 1911.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, February 21, 1911.*

**REGISTERS AND RECEIVERS, *United States Land Offices,***  
*North Dakota, South Dakota, Nebraska, Idaho, Montana,*  
*Colorado, Utah, Wyoming, Minnesota, Washington,*  
*Oregon, Arizona, and New Mexico.*

**GENTLEMEN:** The following instructions are issued for your guidance in the administration of the act of Congress approved February 13, 1911, "Extending the time for certain homesteaders to establish residence upon their lands" (Public—No. 357), a copy of which is attached hereto.

The 1st section of the act applies to all homestead entries in the states named made after June 1, 1910, and in such cases the entrymen are given until May 15, 1911, to establish residence upon their claims. It also applies to soldiers' declaratory statements filed in the states named after June 1, 1910, and such declarants are given until May 15, 1911, to make their homestead entries and establish their residence on the land. If any payment is required to be made in connection with the entry under the declaratory statement, as in the case of ceded Indian reservations, the act also operates to extend the payment until the entry is made.

The 1st proviso to section 1 of the act provides that the period of commutation or of actual residence shall not be shortened. Entrymen who have taken advantage of this extension can not submit commutation proof until they have maintained substantially continuous residence for fourteen months from the date same was established; and in five year proof can not claim credit for constructive residence for more than six months prior to the date actual residence was established.

Under the 2d proviso of section 1 the act will not be held to defeat the adverse claim of one who has prior to the approval of this act, made entry over a soldiers' declaratory statement where the six months allowed the soldier for making entry and establishing residence has expired prior to February 13, 1911. Nor will it be held to defeat a contest against a homestead entry filed after the expiration of six months from date of entry and prior to the passage of this act.

The 2d section of the act grants a leave of absence from February 13, 1911, to May 15, 1911, to all homestead entrymen or settlers in the states named in the 1st section of the act. Entrymen who avail themselves of this leave of absence can not claim credit for residence during the time they are absent under such leave, such period of absence being simply eliminated from consideration in cases of either final or commutation proofs.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary.*

[PUBLIC—No. 357.]

An Act Extending the time for certain homesteaders to establish residence upon their lands.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons who have heretofore filed declaratory statements or made homestead entries in the States of North Dakota, South Dakota, Nebraska, Idaho, Montana, Colorado, Utah, Wyoming, Minnesota, Washington, and Oregon, and the Territories of Arizona and New Mexico, where the period in which they were or are required by law to make entry under such declaratory statements or to establish residence expired or expires after December first, nineteen hundred and ten, are hereby granted until May fifteenth, nineteen hundred and eleven, within which to make such entry or establish such residence upon the lands so entered by them: *Provided*, That this extension of time shall not shorten either the period of commutation or actual residence required by the homestead law: *Provided further*, That this Act shall not affect an adverse claim initiated prior to the passage of the Act and after the expiration of the time allowed an entryman for establishing residence on the land.

SEC. 2. That homestead entrymen or settlers upon the public domain in the States and Territories above named be, and the same are hereby, relieved from the necessity of residence upon their lands from the date of the approval of this Act to May fifteenth, nineteen hundred and eleven: *Provided*, That the time of actual absence during the period named shall not be deducted from the full time of residence required by law.

Approved, February 13, 1911.

HAGSTROM *v.* MARTELL.

*Decided February 23, 1911.*

## TURTLE MOUNTAIN INDIANS—HOMESTEAD—ACT OF APRIL 21, 1904.

In case a Turtle Mountain Indian made homestead entry of public land either prior or subsequent to ratification by the act of April 21, 1904, of the agreement with the Turtle Mountain band of Chippewa Indians, said entry will be held and treated as a selection under said agreement and to exhaust his rights thereunder.

PIERCE, *First Assistant Secretary*:

Joseph Martell appealed from decision of the Commissioner of the General Land Office of May 25, 1910, holding for cancellation his homestead selection No. 1, made December 16, 1905, as a member of the Turtle Mountain band of Chippewa Indians, under agreement of October 2, 1892, ratified by the act of April 21, 1904 (33 Stat., 189, 195), for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and lots 6 and 7, Sec. 6, T. 149 N., R. 81 W., Minot, North Dakota.

Said agreement as ratified provided, in Article VI thereof, that:

All members of the Turtle Mountain band of Chippewa Indians who may be unable to secure land upon the reservation above ceded may take homesteads upon any vacant land belonging to the United States without charge, and shall continue to hold and be entitled to such share in all tribal funds, annuities, or other property, the same as if located on the reservation: *Provided*, That such right of alternate selection of homesteads shall not be alienated or represented by power of attorney.

September 23, 1902, Joseph Martell made homestead entry No. 19360, for the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , and lot 6, Sec. 7, T. 148 N., R. 80 W., Bismarck series, upon which he offered final proof. Final certificate issued to him February 26, 1904, and patent October 28, 1904. This entry was made by Martell as a citizen of the United States.

Subsequent to the ratification of the agreement with the Turtle Mountain band of Chippewa Indians by the act of April 21, 1904, Martell was enrolled with said Indians and a certificate was issued December 8, 1905, by the superintendent in charge, which recited that Martell was a duly enrolled member of said band and entitled under the act, together with the members of his family, to allotment of land in severalty on the public domain. No reference was made to Martell's prior homestead entry.

December 16, 1905, Martell made homestead selection on the public lands under the act of April 21, 1904, as hereinbefore stated. His name was on a schedule of selections approved by the Department, and the Commissioner of the General Land Office was directed to issue patents on said schedule, but Martell's selection was never actually patented.

November 16, 1909, the local officers at Minot, North Dakota, transmitted a corroborated affidavit of Carl M. Hagstrom in which he alleged that Martell had exhausted his right to make entry on the public lands either under the homestead law or under the Turtle Mountain act of April 21, 1904, and asked for a hearing that he might prove his charges. The Commissioner of the General Land Office held that Martell exhausted his right by completing his homestead entry No. 19360 and receiving patent therefor, and that he was not entitled to make selection as a Turtle Mountain Indian. The Commissioner accordingly held Martell's selection as such Indian for cancellation, he being notified that upon failure to show cause, or to appeal, said selection would be canceled.

The act of April 21, 1904, came before the Department for construction soon after its passage. In an opinion of the Assistant Attorney-General dated January 24, 1905 (19 Ops., 40, 46, 47), it was said among other things:

An unusual and in many respects unfortunate condition exists here, due in large part to the long delay in acting upon the agreement negotiated in 1892, and not ratified by Congress until 1904. In the meantime many of the Indians having, perhaps, in mind the provisions allowing any who could not secure land on the reservation to make selections from the public domain, and influenced by the fact that the public domain was being rapidly appropriated, asserted claims to public lands under the general homestead laws, the Indian homestead laws and the Indian allotment law. Such Indians should not be made or allowed to suffer injury by reason of having asserted such claims. Those claims should now be held and treated as selections under the agreement.

The presumption is indulged in the foregoing that Indians in like situation to Martell knew of their right of selection as Turtle Mountain Indians, and also knew that the reservation lands would not be sufficient to allot each member of the tribe his share. Such presumption was seemingly warranted in view of the express terms of the agreement, which provided that all members of the Turtle Mountain band who might be unable to secure land upon their reservation could take homesteads upon the public domain.

In the case of John D. Renville, a Turtle Mountain Indian, in the matter of his appeal from the action of the local officers at Minot, North Dakota, rejecting final proof on his homestead entry made December 28, 1903, the Department on May 14, 1906, transmitted a report from the Commissioner of Indian Affairs in said case to the Commissioner of the General Land Office wherein it was said:

The Office is clearly of the opinion that it was the intent of Congress to make but one gratuitous grant of land to each member of the Turtle Mountain band; that is, a member should not be entitled to a homestead as a citizen of the United States, and also an allotment of 160 acres under the agreement. Allotments under this agreement seem to be of the nature of allotments under

the fourth section of the General Allotment Act, and it is well settled that an Indian who takes land under the latter act is not also entitled to a homestead, or, an Indian taking a homestead is not entitled to an allotment.

In the case under consideration it is the opinion of the Office that John D. Renville should be required to elect whether he will take this land under the General Homestead Act or under the act of April 21, 1904, and that he should be advised that he cannot take under both laws. If he chooses to take under the General Homestead Act, he should be advised that his name will be stricken from the roll of the Turtle Mountain Indians, and that he will be allowed no further rights as a member of that band. He should also be required before his final proof is accepted, to return the certificate of membership in that band which has been issued to him by the Superintendent in charge of the Devils Lake Agency, North Dakota, in order that he may not present it to the local land officers in some other district and thereby be permitted to make a selection of land under the above mentioned act of April 21, 1904.

September 12, 1906, the Department transmitted another report in the Renville case by the Commissioner of Indian Affairs, the recommendation made in said report being expressly concurred in by the Department, in which it was determined:

Upon further consideration of the case and its possible effects on the members of the families of such Indians as have made homestead entry for lands on the public domain, the Office is of the opinion that the allowance to them of an election as to under what law their title shall come would result in depriving the Indian and the members of his family of the rights to which he is entitled under the treaty made with this tribe where the election is to proceed under the general law, and would in a short time leave the Indian without means of sustenance. Accordingly, I have the honor to modify the recommendations as contained in my letter of May 9, 1906, so as to recommend that all selections of public lands made by members of the Turtle Mountain band of Indians be held and considered as selections under the act of April 21, 1904 (33 Stats., 195), made in lieu of any allotment to which the Indian might have been entitled on the reservation under the above act; and that the local land officers be instructed to treat all entries made by members of the Turtle Mountain band of Indians for lands on the public domain, as allotments in lieu of reservation lands; as only by this means can the nation's wards be protected from unwise or vicious acts, influenced by those desiring to profit by securing title to the lands selected by the Indian, which would be possible under the general act.

In recommendation of June 4, 1908, from the Commissioner of Indian Affairs, approved by the Department June 5, 1908, relative to issue of trust patents to Turtle Mountain Chippewas, and wherein reference is made to the opinion of the Assistant Attorney-General of January 24, 1905, *supra*, it was said:

From the foregoing it appears that all members of this band are entitled to a homestead or an allotment on any of the vacant lands belonging to the Indians. If a change in the act under which these allotments or homesteads are held is made from the general allotment act to the act of April 21, 1904, it will allow all members of this band an allotment of 160 acres.

Inasmuch as the proposed change will prove a material benefit to the Indians of this band, it is respectfully recommended that the Commissioner of

the General Land Office be directed to instruct the local land officers to the effect that all applications prior as well as subsequent, received from members of this band, be entered, under the act of April 21, 1904, instead of under the general allotment act.

From the foregoing it appears that the question involved in this appeal has heretofore been considered and determined—that is, in case a Turtle Mountain Indian made homestead entry on the public lands prior or subsequent to the ratification of the agreement by the act of April 21, 1904, said entry is held and treated as a selection under said agreement and to exhaust his rights thereunder. In this no distinction appears to have been made between patented and unpatented entries, and in light of the true situation, which is to determine the rights of each member under the agreement, no such distinction is warranted.

Considering the evident purpose of the act of April 21, 1904, which was to give to those members of the Turtle Mountain band selections on the public domain where they are unable to secure them on the reservation, it is not to be supposed that when the members have already received 160 acres out of the public lands, it was intended to also give them another selection out of such lands under said act. That this must be so is indicated by reference to the provisions of other acts, as well as to numerous departmental decisions along similar lines. Thus, the act of January 14, 1889 (25 Stat., 642), for allotments to the Chippewa Indians in Minnesota, provided that the amount theretofore allotted to any Indian on his reservation should be deducted from the amount of allotment to which he was entitled under the act. The same principle was there involved as if the Indian had previously received an allotment or homestead on the public domain in lieu of land on his reservation.

In the Turtle Mountain act of April 21, 1904, the selections to which Indians are entitled thereunder, both on the reservation and public domain, are characterized as "homesteads." In opinion of the Assistant Attorney-General of January 24, 1905, *supra*, it is said:

It is apparently a matter of form rather than of substance whether the land awarded to the members of this tribe, or the claim thereto, be designated as an "allotment" or as a "homestead." The purpose is to secure to each member land for his individual use and occupation and eventually to vest in him the full title of such land. No condition as to residence or improvement is imposed and in this respect the claim partakes of the nature of an allotment rather than of a homestead. The designation "homestead" used in the agreement was evidently intended to describe a holding in severalty rather than to describe the right defined by the public land laws as a homestead. As a whole, the rights of these Indians are similar to the rights of those of other tribes under the first section of the general allotment act of February 8, 1887 (24 Stat., 388). As a matter of convenience these claims may be named allotments, although not controlled in every detail by the rules relative to allotments.

In the case of Jim Crow (32 L. D., 657, 659) it was held:

Congress has recognized that allotment claims are of the same nature as homestead rights. A fund had been provided for assisting Indian homesteaders and carried upon the books of the Treasury Department under the title "Homesteads for Indians," and by the act of March 3, 1891 (26 Stat., 989, 1007), the Secretary of the Interior was authorized and directed to apply the balance of this fund for the employment of allotting agents "to assist Indians desiring to take homesteads under section 4," of the act of February 28, 1887.

Here Congress characterized claims under the allotment act as homesteads. Claims under the various laws relating to Indian homesteads may with equal propriety be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned.

Allotments or homesteads on the public domain under the act of April 21, 1904, are in effect very similar to allotments under the 4th section of the general allotment act of February 8, 1887, except that no residence is required under the act of 1904. Said fourth section is in part as follows:

That where any Indian not residing upon a reservation, or for whose tribe no reservation, has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

In letter of February 18, 1909, to the Commissioner of Indian Affairs, the Department ruled as follows:

An Indian, a member of the Santee Sioux tribe, is seeking an allotment outside the reservation of her tribe. That tribe had a reservation, but it did not contain sufficient area to furnish all the members with allotments. The 4th section of the act of February 8, 1887, provides for allotment to Indians not residing upon a reservation or for whose tribe no reservation has been provided. The regulation and the forms prescribed thereunder require that an applicant under this section shall state that he was not residing upon a reservation at the date of said act, or, in lieu of that statement, that no reservation has been provided for his tribe.

An Indian who is precluded from taking an allotment upon the reservation of his tribe because there was not sufficient land in such reservation to provide an allotment for each member, is just as much within the spirit of the law as is one for whose tribe there was no reservation. Any construction of the law which excluded one so situated from the benefits of the act would be unwarranted.

It was held in the case of Henry Ford (12 L. D., 181), that an Indian who has availed himself of the benefit of the preemption and homestead laws is not entitled to an allotment under the fourth section of the general allotment act of February 8, 1887. And in the cases of Amy Hauser *et al.* (13 L. D., 185), on review (20 L. D., 46), it was held that a member of the Cheyenne and Arapahoe tribe of Indians who accepted an allotment on the public domain under the fourth section of the general allotment act could not receive a further



allotment within the reservation of his tribe under the later act of March 3, 1891, which ratified an agreement with said Indians.

In the case of *Josephine Valley et al.* (19 L. D., 329), wherein it was held that an Indian may not be a member of two tribes in the sense that will entitle him to secure lands from both tribes under the provisions of the allotment act of 1887, it was said:

It seems to me to be very clear that Congress never intended to confer a dual privilege upon any one Indian and no tribal arrangements or relations will receive such a construction as to give one person a twofold interest in a beneficent provision of a statute manifestly intended to treat all individuals affected thereby in the same manner.

In this connection see also cases of *John and Peter Anderson* (11 L. D., 103); *John Anderson* (13 L. D., 312); *Niels Esperson*, on review (21 L. D., 271); and instructions under the *Turtle Mountain act* (36 L. D., 452).

The decision of the Commissioner of the General Land Office herein holding for cancellation *Joseph Martell's* homestead selection under the act of April 21, 1904, for the reason that he had theretofore exhausted his right, is hereby affirmed. At the same time note will be made of the fact that no preference right of entry is secured by *Carl M. Hagstrom* by reason of the charges preferred by him against said selection. *Bryant v. Gill et al.* (29 L. D., 68); *Lizzie Bergen* (30 L. D., 258); *Regulations* (30 L. D., 546); and *Collins v. Hoyt* (31 L. D., 343).

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SHIRLEY S. PHILBRICK.

*Decided February 23, 1911.*

ALASKA—SOLDIERS' ADDITIONAL LOCATION ALONG NAVIGABLE WATERS.

Under the provisions of the act of March 3, 1903, amending section 1 of the act of May 14, 1898, a soldiers' additional claim can not be located, along any navigable waters in the District of Alaska, within eighty rods of any claim theretofore located along such waters under any law whatever.

LOCATIONS ALONG NAVIGABLE WATERS IN ALASKA.

Where the frontage meander line of a soldiers' additional claim in Alaska is projected along the shore of navigable waters for a distance of 160 rods for the boundary of such claim, the claim can not be further extended in the general direction of the shore, but must be cut off at that point and the remaining lines so located as to conform to the requirements of the statute which limit the frontage on the shore to 160 rods and provide for a reservation of 80 rods between locations; but such claim may be further extended in a cardinal direction, if not in the general direction of the shore, beyond the point where the claim departs from the shore line.

PIERCE, *First Assistant Secretary*:

This is a motion for review of departmental decision of October 29, 1910, which affirmed the action of the Commissioner of the Gen-

eral Land Office, rejecting survey No. 835 of soldiers' additional homestead claim of Shirley S. Philbrick for 61.22 acres of land on the west shore of Mine Harbor in Herendeen Bay, Alaska Peninsula.

In the former decision two objections were made against allowance of the claim, as follows:

1. It is coterminous on the north with coal land survey No. 215 and hence violates the provision of law requiring a reservation of 80 rods between claims.

2. The claim exceeds the limit provided by law which permits such a claim to extend only 160 rods along the shore of navigable water.

It is urged in the motion that as a matter of fact the claim does not extend along the shore in excess of 160 rods, the distance permitted; that as a matter of law there is no prohibition against allowance of an agricultural claim bordering on the shore within 80 rods of a mineral claim bordering on the shore.

Section 1 of the act of May 14, 1898 (30 Stat., 409), extended to the district of Alaska the homestead laws of the United States including the right to locate soldiers' additional homestead claims with certain restrictions, one of which is as follows:

That no entry shall be allowed extending more than 80 rods along the shore of any navigable water, and along such shore a space of at least 30 rods shall be reserved from entry between all such claims.

Section 10 of the said act provides for the purchase of lands in said district used for the purposes of trade, manufacture or other productive industry and contains, among other provisions, the following:

That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway.

The act of March 3, 1903 (32 Stat., 1028), amended section 1 of the said act of May 14, 1898, and among other provisions contains the following:

That no location of scrip, selection or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise. . . . That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims. . . . If any of the land . . . is unsurveyed, then the land . . . must be in rectangular form not more than a mile in length, and located upon north and south lines run according to the true meridian.

It will be observed that the words "or otherwise" used in the above provision quoted from the act of 1903 make the terms of exclusion much broader than the act of 1898. The words "or otherwise" were inserted in conference on the bill between the two branches of Congress and were undoubtedly placed there after due consideration of its effect and with the intention of reserving from location under said provision of law a strip of eighty rods along the shore not only between any two claims of this kind but also between a claim sought to be located under said provision and any other claim theretofore located under any other provision of law. It is urged in argument by claimant's counsel that the effect of such ruling as stated above will be to deny the right to make mineral locations within the reserved areas; that is, if an agricultural claim of this character may not be located within eighty rods of a mineral claim along the shore, neither can a mineral claim be located within eighty rods of such agricultural claim. It is not believed that the result suggested will follow as a necessary consequence, but the question is not now here for determination. This case involves the validity of a soldiers' additional homestead claim, the location of which must be governed by the provisions of the statute applicable thereto, and as the location does not conform to those provisions, it might be properly rejected for the sole reason that it is located within eighty rods of a claim previously located. However, there is another serious objection to the allowance of the location.

This claim extends along the meander line of the shore to the full limit of 160 rods, then further extends in the same general direction north for a distance of 6.30 chains across a narrow peninsular-shaped strip and again touches the shore line, from which point the line runs to the boundary line on the east opposite the shore line. To allow the claim as surveyed would permit the claimant to control the area adjacent to the shore of said strip in practical effect almost if not quite as well as if he actually owned said area. It would countenance and give effect to a palpable attempt at evasion of the law, for he would in practical effect control the shore line adjacent to the whole claim, the two extreme corners of which touch the shore. This is an excess of shore line over that allowed by law. Where a frontage meander line is projected along the shore for a distance of 160 rods for the boundary of such a claim in Alaska, the claim can not be further extended in the general direction of the shore but must be cut off at that point, and the remaining lines so located as to conform with those requirements of the statute which limit the frontage on the shore to one hundred and sixty rods, and provide for a reservation of a space of eighty rods between locations. Such claim might, however, be further extended in a cardinal direction if not in the general

direction of the shore beyond the point where the claim departs from the shore line.

After full consideration of the matters urged in the motion this claim is found properly subject to the two objections assigned in the former decision. The motion is accordingly denied.

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MATILDA M. RAKEMAN.

*Decided February 23, 1911.*

**POLSON TOWNSITE—RIGHT OF MARRIED WOMAN TO ENTER ADDITIONAL LOT.**

Under the provisions of section 17 of the act of June 21, 1906, a married woman, a *bona fide* resident, is entitled to enter an "additional lot" of which she was in possession and upon which she had substantial and permanent improvements, notwithstanding her husband may have theretofore made entry of both a residence and an additional lot.

**PIERCE, *First Assistant Secretary.***

Matilda M. Rakeman appealed from decision of Commissioner of the General Land Office of May 5, 1910, denying her application to purchase lot 6, block 11, Polson, Kalispell, Montana.

Polson was laid out as a townsite under section 17, act of June 21, 1906 (34 Stat., 325, 354), which directed the Secretary of the Interior to lay out a townsite, and provided that:

Any person, who, at the date when the appraisers commence their work upon the land, shall be an actual resident upon any one such lot and the owner of substantial and permanent improvements thereon, and who shall maintain his or her residence and improvements on such lot to the date of his or her application to enter, shall be entitled to enter at any time prior to the day fixed for the public sale and at the appraised value thereof, such lot and any one additional lot of which he or she may also be in possession and upon which he or she may have substantial and permanent improvements: . . . the applicant shall make proof to the satisfaction of the register and receiver of the land district in which the land lies, of such residence, possession, and ownership of improvements: . . . It shall be the duty of the appraisers to ascertain the names of the residents upon and occupants of any such lots, the character and extent of the improvements thereon, and the name of the reputed owner thereof, and to report their findings in connection with their report of appraisal, which report of findings shall be taken as *prima facie* evidence of the facts therein set out. All such lots not so entered prior to the day fixed for the public sale shall be offered at public outcry in their regular order, with the other unimproved and unoccupied lots.

December 31, 1908, the appraisers began, and, January 2, 1909, finished their work. Their report, as to this lot shows the "actual resident and owner" was Matilda M. Rakeman, and her improvements were a one-story new frame building, felt roof, 20 by 30, lot appraised at \$400. She applied to purchase by virtue of residence on it, which the local office rejected September 3, 1909, because (1) proof was premature, being made September 2, 1909, before a United

States Commissioner; (2) because the report showed the true owner of the improvements was Christian H. Rakeman; and (3) that she was married, not living separate and apart from her husband Christian H., who has purchased two other lots, residence and additional. She appealed to the Commissioner of the General Land Office. Pending that appeal, the local office offered the lot for sale, and September 10, 1909, gave James Foxall certificate of sale of the lot to him. He has made no formal intervention, but appeared in this proceeding, filing briefs and affidavits against Mrs. Rakeman's claim.

May 7, 1910, on Mrs. Rakeman's appeal, the Commissioner affirmed the action of the local office, on the ground that she being a married woman, not separated from her husband, could have no legal residence apart from him or obtain preference right to purchase a lot as her residence. She appealed to the Department.

November 18, 1910, the Department held that:

The decision of the Commissioner of the General Land Office can not be sustained upon this record. Without inquiring into the broad principles underlying this question, it will be enough to say that they are founded upon the theoretic identity of person and of interest between husband and wife as established by law, are subject to many exceptions, and may have no application to the case here presented; but it is not thought best to finally determine the rights of Mrs. Rakeman upon the record as made up. It is little more than a mass of *ex parte* affidavits, some tending to show that Mrs. Rakeman resided on this lot during the time covered by her proof, and others tending to show she in fact resided during this time with her husband on a different lot. . . . This question ought not to be determined upon *ex parte* evidence.

A hearing was therefore ordered for taking testimony as in an adversary proceeding, and the question was suggested whether "more than one person residing on the same lot might acquire title to an 'additional lot' without being able to acquire title to the lot upon which he or she resided." It was ordered that notice of such hearing be given to Foxall, with opportunity to offer proof, in his own behalf, or in rebuttal of that offered by Mrs. Rakeman, and he should be required to show why his purchase certificate should not be canceled.

After notice for hearing Foxall objected to its being held, and Mrs. Rakeman assented to such objection, both requesting early decision of the merits on the case as made. This necessarily adopts the *ex parte* affidavits filed as testimony of witnesses taken on notice, with full opportunity for cross-examination.

The testimony by affidavits is unequivocal, by nine affidavits of six persons, five others than Mrs. Rakeman, that she actually lived in the building on this lot, owned the improvements, and occupied the building as a military store from as early as November, 1908, until after January 2, 1909, some of them extending that residence into July, 1910.

To the contrary are four affidavits of different affiants, that Mrs. Rakeman resided from before December 31, 1908, until after January 2, 1909, with her husband on another lot to which he acquired title as resident thereon. One of these by Jerome Moran is totally destroyed by his subsequent affidavit that he did not reside in Polson for more than two years preceding June 15, 1909, and "never has had any knowledge whatsoever as to the residence of Matilda Rakeman" prior to his moving into two rooms of said premises September 23, 1909; that only so much of his prior affidavit was read to him as related to his own residence there, and he would not have signed it had he understood it.

The numerical weight of evidence clearly preponderates in favor of Mrs. Rakeman by more than two to one, and the *prima facie* evidence by the report is not overthrown. But it is unnecessary to infer that any of affiants committed perjury. All are reasonably reconcilable on different view points of the affiants as to what constitutes residence within meaning of the statute, some regarding the abode of the husband as conclusively the residence of the wife from whom he was not estranged: others regarding the residence as the place where she had her sleeping apartment, or dormitory, and her place of business. Mrs. Rakeman conducted during this time a separate business as milliner in the building owned by her on the lot in controversy.

The intent of the statute was to afford *bona fide* residents of the town—those who had settled there in good faith and founded it—preference right to acquire title to the residence or home lot, and to one other lot on which such person had made beneficial permanent improvements. It is in line with similar statutes in other similar cases, and is clearly of the general class termed remedial—entitled to be so construed as to advance the remedy and to effect its clear intent. The pioneers upon the border of advancing social order go upon lands knowing they thereby acquire no rights, but, in light of the history of legislation, with perfect assurance they will be equitably and liberally dealt with and their interests will be protected if, and when, Congress opens the land to private appropriation. *Lamb v. Davenport*, 18 Wall., 307, 314; *Ard v. Brandon*, 156 U. S., 537, 543; *Tarpey v. Madsen*, 178 U. S., 215, 221.

In the present case the land was an Indian trust, held by the United States, to be disposed of to civilized people for use and benefit of the Indians. The land was enhanced in value by the coming of pioneer settlers, who, in advance of formal opening to disposal, established homes and trade centers, demanding provision for townsite holdings. Congress determined, as it had in many similar cases, that it was just to the Indians and due to the pioneers to give a preference right of purchase to those who made homes there before opening to

general sale, and also give preference right of purchase to those having homes there, to extent of one lot that they had substantially improved.

There are thus two classes described in the statute as entitled to the preference right: 1. Those desiring to purchase the home; and, 2, those having *bona fide* residence in the town for purchase of one additional lot which they had possession of and had substantially improved. It is not necessary to base Mrs. Rakeman's preference right upon her claim of residence. As preference right to acquire a home was fully protected by the act of her husband in acquiring a home, and one home fully provides for one unbroken family, her home right was exhausted by his acquisition of title to it, as would his have been had she proceeded to acquire title and he neglected to do so.

But the evidence all concurs to show she had substantially improved the lot with a building, sufficient in that town to accommodate the business she established in it. There is some variance in the evidence as to its cost and value, but no question it was sufficient for the trade conducted in it and demanded there. Mrs. Rakeman was a *bona fide* resident of the town and so had preference right to acquire one additional lot to that whereon was her home. The statute does not in terms limit the additional improved lot right to one additional lot for each family, and makes that right personal to such resident citizens as had substantially improved a lot. Mrs. Rakeman was qualified under the statute, and while she sought to purchase the lot under claim of residence and a home upon it, erroneous designation of the base of her claim would not invalidate her application, as a valid right in fact existed to make the purchase. The decision is reversed, and the purchase will be allowed under her right as *bona fide* resident of the town to purchase one lot, substantially improved by her, in addition to that on which the family resided of which she was a member.

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W. H. SKINNER ET AL.

*Decided February 24, 1911.*

DESERT ENTRY IN RECLAMATION PROJECT—PAYMENT—FINAL PROOF AND PATENT.

Under the desert land act as modified by the act of June 27, 1906, final proof upon a desert entry within a reclamation project can not be held to have been made and completed until the payments required by said acts and the act of June 17, 1902, have been made; and the Department is without authority to accept or regard final proof in such cases as complete, or to issue patent thereon, until after full compliance with the terms of payment imposed by the reclamation act.

## PAYMENT OF RECLAMATION CHARGES—FINAL PROOF, CERTIFICATE AND PATENT.

Where, however, the parties in interest are able to negotiate loans for amounts sufficient to pay the entire reclamation charges upon any entry, contingent upon the prompt issuance of final certificate and patent, consideration of the final proof and issuance of final certificate and patent, in cases otherwise regular, may be expedited.

PIERCE, *First Assistant Secretary*:

The Department is in receipt, through the Commissioner of the General Land Office, of the verified petition of W. H. Skinner, in behalf of himself and forty-eight other persons, praying that final certificate and patents be issued upon certain desert land entries within the Umatilla irrigation project in Oregon, in which cases it is alleged entrymen have relinquished or disposed of the lands in each entry in excess of 160 acres and have submitted final proofs of compliance with the desert land law, but are, under the ruling of the Department in the case of Leroy W. Furnas (38 L. D., 194), denied final certificate and patent upon said entries until all payments for water rights for said entries have been made to the United States and water rights have permanently attached to the land. The attorney for petitioners has been heard orally by the Department, and the arguments so presented, as well as those submitted in a written brief filed, have been carefully considered.

Stress is laid upon the fact that in 1905, this Department issued instructions (34 L. D., 29) holding in substance that lands held under desert land entries are in effect lands held in private ownership within the meaning of the reclamation act of June 17, 1902, and that the desert entryman, or his assignee, is entitled to the same rights and privileges, so far as the right to the use of water is concerned, as any other owner of private land within reclamation projects, and upon the fact that the petitioners acted upon the suggestion contained in said instructions and subscribed their lands to the reclamation project prior to the enactment of section 5 of the act of June 27, 1906 (34 Stat., 520), upon which act the ruling of the Department in the Furnas case, *supra*, is predicated. There is also presented the advisability and importance of such action as will facilitate the subdivision, reclamation, and improvement of these desert lands, which result, it is averred, will be more readily and quickly obtained if entrymen are given patents for their lands at the present time and not required to wait until all payments for water rights under the reclamation project have been completed.

The Department is not inclined to dispute the correctness of the contention that the division of the lands in question into small tracts and their improvement and reclamation would be facilitated if entrymen, or their assignees, could now be vested with the fee simple title



to the land. The question presented, however, is one of law, not of expediency. The desert land law of March 3, 1877, as amended by the act approved March 3, 1891, permits the entry of not exceeding 320 acres of arid public land, requires annually certain proofs and payments to be made, and allows four years from date of original entry within which to make satisfactory proof of the reclamation and cultivation of the land to the extent and amount required in the law; whereupon it is provided that patent shall issue. The reclamation act of June 17, 1902, as originally enacted, dealt with two classes of lands in reclamation projects: public lands subject to homestead entry upon which were imposed, as a prerequisite to patent, additional conditions of reclamation and of payment in not exceeding ten annual instalments for water rights, and of lands in private ownership for which the right to the use of water could be sold for tracts not exceeding 160 acres to such owners as resided upon the land or in the neighborhood. The desert entries in question were, of course, made prior to the inclusion of the lands in the reclamation project, but had not been improved, reclaimed, and paid for as required in the desert land laws at time of such withdrawal.

The instructions of the Department of July 14, 1905, *supra*, do not undertake to specify when final certificates or patent will issue upon desert land entries within reclamation projects, but did provide that the entrymen, or their assignees, might obtain the right to the use of water from the reclamation project upon the same terms and conditions as private landowners. Whatever may have been the intent or the effect of such instructions, however, the Department must now be guided by the requirements and conditions imposed by Congress in the act of June 27, 1906, *supra*, section 5 of which appears to have had a two-fold purpose: first, to relieve desert land entrymen in reclamation projects from the necessity of submitting proof of improvement, reclamation, and payment for their lands within four years from date of original entry in cases where the land had, after date of such original entry, been included in a Government reclamation project; second, to permit, where the Government carried its reclamation project to completion, such an entryman to secure the benefits of the Government reclamation project upon condition that he surrender all lands in his entry in excess of 160 acres and "make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June 17, 1902, and not otherwise."

In extending these benefits to the desert land entrymen, it is entirely reasonable to assume that Congress also intended to impose such limitations and conditions as might be deemed necessary, not only to secure the permanent reclamation of the land, but to insure that before fee simple title to the land passed from the Government, it

should be reimbursed for the building cost of the reclamation projects in so far as same was chargeable to the land. If entrymen had been, either directly or indirectly hindered, delayed, or prevented from reclaiming the lands by reason of the withdrawal of the lands in connection with the reclamation project, the time that he was so hindered, delayed, or prevented was not to be counted against him in computing the period within which he was required to effect reclamation and submit proof under the desert land laws. On the other hand, if the Government project was completed and entrymen sought to take advantage of the same in securing a supply of water for the reclamation of the lands from reservoirs and canals constructed by the Government, the condition was to be imposed upon him that as a prerequisite to the perfection of his entry and the issuance of patent thereon, he should have complied with the terms of payment prescribed in the reclamation act, so as to secure him a paid-up water right prior to the passing of fee title from the Government to him. This construction appears to be not only in accordance with the intent of the law, but clearly with the language of the act itself "he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June 17, 1902, and not otherwise."

Under the desert land act, as modified by the act of June 27, 1906, *supra*, final proof can not be held to have been made and completed until the payments required by the provisions of said acts and of the act of June 17, 1902, *supra*, have been made, and this Department is, in my opinion, without authority to accept or regard final proof in such cases as complete, or to issue patent thereon, until after full compliance with the terms of payments imposed by the reclamation act has been had. The petition must, therefore, be denied.

If, however, the parties in interest are able to negotiate loans for amounts sufficient to pay the entire reclamation charges upon any entry, contingent upon the prompt issuance of final certificate and patent, consideration of the final proof and issuance of final certificate and patent, in cases otherwise regular, may be expedited.

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STATE OF MINNESOTA *v.* CAVASIN.

Petition for exercise of the supervisory power of the Secretary to review departmental decision of November 3, 1909, 38 L. D., 284, adhered to on motion for review September 17, 1910, 39 L. D., 221, denied by First Assistant Secretary Pierce, February 25, 1911.

## PITTSBURG-NEVADA MINING CO.

*Decided February 25, 1911.*

## MINING CLAIM—SEVERANCE—ENTRY AND PATENT.

Where there has been a severance of a mining claim, entry may be allowed and patent issued on the part of the claim within which discovery was made, and as to which all the requirements of the mining laws have been met, without regard to the remainder of the claim.

PIERCE, *First Assistant Secretary*:

The pending appeal is from so much of the decision of the Commissioner of the General Land Office of February 6, 1911, as holds for cancellation appellant's entry (No. 04285) for the Ruby No. 4 lode mining claim, survey No. 3706, Carson City, Nevada, land district, upon the stated ground, among others, of lack of title to the entire location.

In its origin, early in 1904, the claim was of the maximum dimensions and area allowable under the law, and as such it passed by a series of conveyances to one Currie, by whom the designated one-half thereof which is here involved (the northerly half, the claim extending in length from north to south) was conveyed to a certain mining corporation of the State, and thence to this appellant. It appears from a statement by the Commissioner that as a whole, as originally located, the claim was made the subject of a mineral survey (No. 3128) and carried through patent proceedings to the point of an entry, but that the entry was canceled because of the antecedent severance.

Following the latter action, the severed one-half here in question, as the Ruby No. 4 claim, was embraced by the mineral survey first above mentioned, and for that area—that is, the claim as thus delimited—patent proceedings were prosecuted, resulting in the entry now held for cancellation.

In adjudging that the patent proceedings should fail for want of a complete title in the appellant, the Commissioner has in view the full claim as it was originally located, was once surveyed (as above remarked), and as it existed up to the time of the severance of the portion covered by the pending entry. In other words, the basis of the objection is that appellant is without title to the other portion or half of the original claim, which, it is held, it is essential that appellant should have, for the reason that that portion is dependent for its existence and validity upon the mineral discovery which is within the limits of the entered portion, and, it is added, "each owner of a divided interest in a mining claim has an interest in the discovery upon which the location is dependent."

In so holding the Commissioner erred. The doctrine expressed in the clause last above quoted is deemed by the Department to be

fundamentally out of harmony with the decision in *Gwillim v. Donnellan* (115 U. S., 45) and unsound in principle. It is not questioned that the severed and entered portion is a complete claim in itself in the matter of delimitation, discovery, and improvements, and as to it the title of the appellant seems to be complete. As a consequence of the severance, and the survey and entry of the portion here in question, the other and remaining portion of the original claim, if it were considered at all, would be independently subject to all the requirements of the mining law. *The Gilson Asphaltum Co.* (33 L. D., 612). The ownership of the latter portion, wherever or whatever it may be, therefore does not affect the entry here under consideration.

The judgment of the Commissioner, as far as covered by the appeal, is reversed, and the case is remanded for such further proceedings, not inconsistent with this opinion, as may appropriately be taken.

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RICARD L. POWEL.

Petition for exercise of the supervisory power of the Secretary to review departmental decision of September 8, 1910, 39 L. D., 177, adhered to on motion for review December 6, 1910, 39 L. D., 385, denied by First Assistant Secretary Pierce, February 28, 1911.

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**SECOND HOMESTEAD AND DESERT-LAND ENTRIES—ACT OF FEBRUARY 3, 1911.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
*Washington, February 28, 1911.*

**THE COMMISSIONER OF THE GENERAL LAND OFFICE.**

SIR: The act of February 3, 1911 (Public—No. 340), provides that any person who, prior to the approval of the act, has made entry under the homestead or desert-land laws but subsequently to such entry, from any cause, shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or the desert-land laws as though such former entry had not been made; there being a proviso to the effect that the provisions of the act shall not apply to any person whose former entry was canceled for fraud or who relinquished such former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

A person seeking to avail himself of the benefits of this law should file in the local land office an application to enter a specific tract of public land, subject to entry under the appropriate law, accompanied by his affidavit, executed before an officer authorized to administer

oaths in homestead cases, stating the description of the former entry by section, township and range numbers, or by number of entry and name of land office, where made, if possible, the date of such entry, and when he lost, forfeited, or abandoned the same. The application should also show that the former entry was not canceled for fraud, and what amount, if any, was received for the relinquishment of the former entry. This affidavit must be corroborated by the affidavit of one or more persons having knowledge of the facts.

Where such an application is presented to the register and receiver they should examine the same, and if found defective for any cause should either suspend or reject it subject to the usual right of appeal. If, on the other hand, the application is formally correct and the party makes the showing entitling him to the benefits of the act, the register and receiver should allow the application, endorsing thereon that the same is allowed under the act of February 3, 1911.

It is believed that the foregoing will enable you to issue necessary instructions to the registers and receivers to enable them to put the law into operation.

Very respectfully,

R. A. BALLINGER,  
*Secretary.*

[PUBLIC—No. 340.]

An Act Providing for second homestead and desert-land entries.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, prior to the approval of this act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this act shall furnish a description and the date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

Approved, February 3, 1911.

#### INSTRUCTIONS.

##### RECLAMATION LANDS—AUTHORITY TO LEASE.

Temporary leases for grazing and other agricultural purposes may be made of lands acquired through condemnation proceedings for reservoir or canal purposes in reclamation projects during such periods as may elapse between the acquisition of title and the actual use of the same for reservoirs and canals.

## PROVISIONS IN LEASES OF RECLAMATION LANDS.

All such leases should state the purpose for which the lands were acquired and that such purpose will not in any manner be interfered with or delayed by the lease; should specifically provide for the immediate, or speedy, termination of the lease in event it is desired to utilize the land or any part thereof for reclamation works, or in event the work of reclamation is found to be hindered or delayed by reason thereof; and should be limited to one year, but may contain provision for renewal for the succeeding year in event the lands should not sooner be needed for reclamation purposes.

*Secretary Ballinger to the Director of the Reclamation Service,  
February 28, 1911.*

I am in receipt of your communication of February 15, 1911, stating that there has been presented to your office the question of leasing, for grazing and other agricultural purposes, certain lands acquired through condemnation proceedings within the Engle reservoir site, Rio Grande Reclamation Project. You ask for a ruling upon the question of leasing lands acquired in this manner, pending the time when the lands shall be needed for construction or reservoir purposes.

The Department has ruled in 34 L. D., 480, and other cases that the Secretary of the Interior has authority to make temporary agricultural leases of lands reserved, or acquired by purchase, for use in connection with irrigation projects where the leases will not interfere with use or control of the lands when needed for the purposes contemplated by the reservation or purchase. This ruling has met with the approval of the Supreme Court of the State of Utah in the case of *Clyde v. Cummings* (101 Pac. Rep., 106), wherein, referring to the case of *United States v. Tygh Valley Land and Live-stock Company* (76 Fed., 693), the court said:

The purpose of the act under consideration, as expressed in the first section thereof, is "the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands." The leasing of the lands in question is merely an incident to the main object to be accomplished under the act. . . . Furthermore, the revenue derived from the leasing of these lands goes into the Reclamation Fund provided for in the act. . . . Therefore, instead of being inconsistent with the act, the leasing of the lands and the results produced thereby, are in strict conformity with it.

Section 7 of the act approved June 17, 1902 (32 Stat., 388), provides that where, in carrying out the provisions of the act, it becomes necessary to acquire any rights or property, the Secretary of the Interior may acquire the same by purchase "or by condemnation under judicial process." Section 484 of the compiled laws of New Mexico, 1897, authorizes the condemnation and appropriation of lands, etc., for uses and purposes of corporations formed for supplying water for irrigation, and section 485 provides that corporations so taking lands, "shall thereby acquire full title to the same, for the

uses and purposes aforesaid." The act of the Territory of New Mexico approved March 16, 1905, providing for the appropriation of lands and property taken for public uses and purposes, authorizes the condemnation of property for irrigation purposes, the proviso to section 21 of the act being as follows:

That any property acquired under the provisions of this act shall be used exclusively for the purposes as set forth in this act, and whenever the use of such property as herein contemplated shall cease for the period of three years, the same shall revert to the original owner, his heirs or assigns.

The fund for the construction and operation of reclamation works provided for by the act of June 17, 1902, is made up of moneys received from the sale and disposal of public lands in certain States, from payments for water rights in reclamation projects, from payments of operation and maintenance charges, sales of town lots, leases of power and power privileges, and of receipts from miscellaneous sources. The act of Congress approved April 4, 1910 (36 Stat., 269, 285), referring to the Strawberry Valley Reclamation Project, recognizes among receipts which may be credited to the project, "rentals," and it appears to be the general policy of Congress from various acts dealing with the public lands in the arid States, and with lands and resources in reclamation projects, to add to the fund available for the construction of reclamation works, or for the reduction of project costs to the landowners and water users in projects, by putting into the fund such revenues as may be derived from sales or leases. Consequently, receipts from leases of lands, acquired through condemnation proceedings for use in reservoirs or canals in reclamation projects during such periods as may elapse between the acquisition of the title and the actual use of the same for reservoirs or canals, may be regarded as furthering and effecting the construction and completion of reclamation works and thereby aiding and accelerating the purpose of the Reclamation Act. It is not possible in large undertakings of this nature to, in all cases, utilize the land for reservoirs or canals immediately after its acquisition, and pending its utilization for that purpose the leasing of the same under proper restrictions or conditions may, as above indicated, result in benefit to the reclamation fund and to the water users in the project in which the lands are situated, and such temporary use is not inconsistent with the purpose for which the lands were acquired.

You are accordingly advised that, in the opinion of the Department, temporary leases for grazing and other agricultural purposes may be made of the lands so acquired, but in all such cases leases should state the purpose for which the lands were acquired, that such purpose will not in any manner be interfered with or delayed by the proposed lease and should specifically provide in each case for the immediate, or speedy, termination of the lease in the event that

it is desired to utilize the land or any part thereof for reclamation works, or in the event that the work of reclamation is found to be hindered or delayed by reason of the lease. I am of the opinion that no lease should cover a period of more than one year, though there would be no objection to incorporating therein a provision giving the lessee the right to renew the same for the following year in the event the lands are not sooner needed by the Government for reclamation works.

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**RECLAMATION-MINIDOKA PROJECT-HIGH LAND AREAS.**

**ORDER.**

DEPARTMENT OF THE INTERIOR,  
*Washington, December 27, 1910.*

Section 4 of the public notice issued October 13, 1910, for the Minidoka project, Idaho, refers to the future irrigation of high land areas by the United States, and in order that the settlers may indicate their desire for such irrigation before it is undertaken, it is hereby ordered—

1. In cases of those high land areas which are to be reclaimed by the United States, the probable cost per acre of each farm unit in a given high land area shall be announced in due time by the Supervising Engineer to the settlers interested. This figure as announced shall be understood to be approximate only, and the charges to be paid shall subsequently be fixed by the Secretary of the Interior, by public notice, when water is ready to be furnished.

2. After such announcement has been made by the Supervising Engineer, construction work will not be started until after a request, asking that the work be taken up, signed by settlers representing at least fifty per cent of the acreage affected and entered, is received by the Supervising Engineer.

3. Only those settlers who, before March 31, 1911, shall have signed the agreement required by the public notice of October 13, 1910, shall be affected by this order.

FRANK PIERCE,  
*Acting Secretary of the Interior.*

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**RECLAMATION-MINIDOKA PROJECT-OPERATION AND MAINTENANCE CHARGE.**

**PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,  
*Washington, January 23, 1911.*

1. In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given that the portion of



the instalment on account of operation and maintenance for the Minidoka project, Idaho, heretofore announced at 75 cents per acre of gravity land shall be increased to cover the cost of drainage works necessary for the proper operation and maintenance of the project.

2. This additional charge shall be assessed against the gravity acreage on the north side of Snake River as shown on the farm unit plats of the Minidoka project, approved by the Secretary of the Interior, June 18, 1910, and filed in the local land office at Hailey, Idaho. This additional charge shall be \$1.00 per acre per annum, and shall remain in effect until further notice. The portion of the instalment for operation and maintenance for such lands for the year 1911, due December 1, 1911, shall therefore be \$1.75 per acre and so continue until further notice, becoming due on December 1 of each year. Payment of these charges (for the year 1911) must be made on or before April 1, 1912, and in like manner for subsequent years.

3. The regulation is hereby established that no water will be furnished in any year to any such lands until payment is made of all charges then due for operation and maintenance. Accordingly, payment of said increased portion of the instalment due December 1, 1911, as well as all charges for operation and maintenance for prior years, must be made on or before April 1, 1912, in order to secure delivery of water at the beginning of the irrigation season, and similarly in subsequent years.

R. A. BALLINGER,  
*Secretary of the Interior.*

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**RECLAMATION—MINIDOKA PROJECT—CHARGES.**

**ORDER.**

DEPARTMENT OF THE INTERIOR,  
*Washington, March 18, 1911.*

1. In pursuance of the act of Congress approved February 13, 1911 (Public—No. 353), entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section 4 of the Reclamation Act and for other purposes," the following order is promulgated for the purpose of relieving the present situation of the gravity lands under the Minidoka project pending the issuance of public notice modifying or abrogating the notices heretofore issued.

2. A stay of proceedings looking to the cancelation of entries or water right applications because of failure to make payment will become effective as to all entries and water right applications subject to the public notices and orders heretofore issued upon the payment on or before March 31, 1911, of \$1.00 per acre plus the operation

and maintenance charges which have heretofore become due and remain unpaid and subject also to compliance with the conditions of a public notice to be hereafter issued which will provide for an increased building charge.

3. Such stay of proceedings shall remain in effect until further announcement by means of a public notice or otherwise. No water will be furnished in any case unless the holdings of the applicant shall have been conformed to the farm unit subdivisions shown on the approved farm unit plats.

4. Upon failure to make payments as herein required on or before March 31, 1911, the entry or water right application, or both, as the case may be, which would otherwise be subject to cancelation, will be promptly canceled without further notice.

5. All applications for water rights filed under the provisions of notices heretofore issued and for which the payment necessary to avoid cancelation shall have been made on or before March 31, 1911, shall be continued in effect under such prior notices; and water right applications may be filed on or before March 31, 1911, under the provisions of the public notices heretofore issued if accompanied by the payments required thereunder and shall be entitled to continue under the terms thereof.

6. The intent of this order is to permit owners or occupants of irrigated gravity lands who so desire to obtain the benefit of the former building charge of \$22 or \$30 per acre by making the necessary payments on or before March 31, 1911 [see order of March 31, 1911, following], and complying with the other provisions of prior notices and orders; and that all other owners or occupants of such lands who desire may be furnished with a water supply upon payment of the sums herein specified and they shall be subject to the conditions of such public notice as may be hereafter issued.

FRANK PIERCE,  
*Acting Secretary of the Interior.*

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ORDER.

DEPARTMENT OF THE INTERIOR,  
*Washington, March 31, 1911.*

Under the order of March 18, 1911, issued for the Minidoka Project, Idaho, payment was required to be made on or before March 31, 1911. On account of the short time allowed it is hereby ordered that the cancellations provided for in such order on account of failure to pay shall not take place if payment as therein required be made on or before April 27, 1911.

WALTER L. FISHER,  
*Secretary of the Interior.*

**RECLAMATION-MINIDOKA PROJECT-WATER SUPPLY-CHARGES.****ORDER.**

DEPARTMENT OF THE INTERIOR,

*Washington, March 24, 1911.*

1. To afford an opportunity for the operation of the irrigation works and pumping plant for the lands above the gravity supply in the Minidoka Project, Idaho, on the south side of Snake River under service conditions and as preliminary to the regular opening of the project, water will be furnished from the south side pumping unit in the irrigation season of 1911 for the irrigable lands as applied for.

2. The charges for operation and maintenance which shall be made for each acre of irrigable land within the project (as shown on farm unit plats approved in connection with the public notice to be hereafter issued) shall be determined in accordance with the estimated cost of operation during the season of 1911 as hereafter announced, and the same shall be payable at the beginning of the irrigation season of 1912 by the water right applicant, in accordance with the terms of the public notice to be hereafter issued as aforesaid.

FRANK PIERCE,

*Acting Secretary of the Interior.*

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**RECLAMATION-BELLE FOURCHE PROJECT-PAYMENT.****ORDER.**

DEPARTMENT OF THE INTERIOR,

*Washington, January 24, 1911.*

The public notices heretofore issued in pursuance of the Reclamation Act of June 17, 1902 (32 Stat., 388), announcing the charges for lands opened to irrigation under the Belle Fourche project, South Dakota, are hereby suspended as to the charges, times and manner of payment, for lands as follows: lands hereafter entered; lands in private ownership, not now held under trust deed; and lands not now signed under contract with the Belle Fourche Valley Water Users Association.

Applications for water rights for such lands may be made and received subject to such charges, time, and manner of payment as may be fixed by public notices hereafter issued.

R. A. BALLINGER,

*Secretary of the Interior.*

## RECLAMATION—FORMS FOR WATER-RIGHT APPLICATIONS.

## FORMS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, January 30, 1911.

THE HONORABLE,

THE SECRETARY OF THE INTERIOR,

SIR: The forms of water-right applications under the act of June 17, 1902 (32 Stat., 388) [4-020 and 4-021], submitted by letter of this office dated November 22, 1910, have been revised in accordance with the suggestions contained in your letter of December 10, 1910, after consultation with the officers of the Reclamation Service, and the revised forms are submitted herewith for your consideration.

It is recommended that if the forms be found satisfactory you attach your signature of approval to this letter and cause the papers to be returned to this office for further proper action.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved January 30, 1911, and returned to the General Land Office for action as recommended.

R: A. BALLINGER, *Secretary*.

FORM B.

4-020

DEPARTMENT OF THE INTERIOR.

WATER-RIGHT APPLICATION.

Act June 17, 1902 (32 Stat., 388).

-----PROJECT.

U. S. LAND OFFICE, -----

SERIAL No. -----

LANDS IN PRIVATE OWNERSHIP.

-----, hereinafter called the applicant, hereby applies for a water right under the ----- Unit, ----- Project, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat., 388), known as the Reclamation Act, and the rules and regulations established thereunder, the water supplied in pursuance thereof to be used for the irrigation of, and to be appurtenant to, ----- acres of irrigable land, as shown on plats approved by the Secretary of the Interior, within the area described as follows: -----, Section -----, Township -----, Range -----, ----- Meridian, an area of ----- acres.

The quantity of water to be furnished hereunder shall be \_\_\_\_\_acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; \_\_\_\_\_or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project: Provided, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land: Provided, however, that if measuring devices are not installed at the land, an increase deemed reasonable by the Reclamation Service official in charge of the project shall be made for losses of water after passing the point of measurement.

The applicant hereby agrees on behalf of himself, his heirs, administrators, and assigns to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior, namely, the sum of \$\_\_\_\_\_per acre for \_\_\_\_\_acres of irrigable land, \_\_\_\_\_in not more than \_\_\_\_\_annual installments, and to pay promptly when due the annual installments and the operation and maintenance charges duly assessed against said land on account of said water right, each and all of which installments and operation and maintenance charges are hereby made and shall be a lien against the above-described premises, such liens attaching immediately upon the execution hereof and being enforceable as to each and every installment, or charge, or portion thereof at such time as the same shall become due in pursuance of public notice issued by the Secretary of the Interior.

It is further agreed and provided that such lien or liens shall have the full force and effect of a mortgage or deed of trust and vest in the United States all the rights and powers which might be exercised and all benefits which might be claimed by the mortgagee in a real estate mortgage given to secure the payment of a loan or debt, including the right of foreclosure by or on behalf of the United States in any court of competent jurisdiction and the applicant grants to the United States or its transferee all the rights, powers, and authority in and over the above-described premises which might be exercised by the trustee named in a deed of trust given to secure the payment of a loan or debt.

The applicant further agrees and binds himself, his heirs, administrators, and assigns to pay all taxes and other liens and encumbrances which are now or may hereafter (during the life of the lien herein given to the United States) become a superior lien or encumbrance to that of the United States, and if the applicant, his administrators, executors, heirs, or assigns fail to pay any such tax, lien, or encumbrance when due, the United States may pay the same and add the amount thereof to the lien held by the United States under this agreement and recover the same.

It is further agreed that upon failure of the applicant to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

*This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the building and operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States or through the medium of the water users' association.*

If the Secretary of the Interior has made no contract with a water users' association under this project, the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the

said project; in default of which, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

And, being duly sworn, the applicant further deposes and says that the post-office address of the undersigned is -----; that the undersigned is a bona fide resident upon said land (or an occupant thereof, residing in the neighborhood, namely, upon Section -----, Township -----, Range -----, ----- Meridian, a distance in a direct line of ----- miles therefrom); that the undersigned holds the following interest in the said tract: ----- as duly shown upon the records of ----- County, -----; that no other application, now uncanceled, has been made for a water right under said act of Congress, appurtenant to land now owned or claimed by the undersigned, except as follows:

Application No. -----, ----- Project, -----, of ----- for -----, Section -----, Township -----, Range -----, ----- Meridian, an area of ----- acres and containing ----- acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in behalf of the undersigned and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in Section 116 of the act of Congress approved March 4, 1909 (35 Stat., 1109).

It is further understood and agreed that if the interest of the applicant in said land shall cease and said interest shall be held by a party who is not qualified to apply for or hold a water right under the provisions of the Reclamation Act, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

It is further understood and agreed that the evidence of ownership of this water right shall not be issued by the United States unless fee simple title to said land is vested in the applicant, or in a qualified assignee hereof, whose aggregate water rights under the said Reclamation Act shall not exceed one hundred and sixty acres, or the maximum limit of area fixed by the Secretary of the Interior, at the time when final payment hereon is due, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights thereunder and of all moneys paid thereon.

-----  
-----  
Applicant.

#### ACKNOWLEDGMENT.

The above application must be signed and sealed in duplicate, acknowledged before a duly authorized officer in the manner provided by local law and duly recorded in the records of the county in which the lands are situated.

Filed in the United States Land Office at \_\_\_\_\_, and accepted  
 \_\_\_\_\_ on behalf of the United States.

(Date.)

[SEAL.] \_\_\_\_\_

Register.

IF THE SECRETARY OF THE INTERIOR HAS ENTERED INTO A CONTRACT WITH A WATER  
 USERS' ASSOCIATION UNDER THE PROJECT, THE FOLLOWING CERTIFICATE MUST BE  
 FILLED OUT:

\_\_\_\_\_, 191  
 I HEREBY CERTIFY that the applicant for this water right has duly subscribed  
 (or is the successor in interest of one who has subscribed) for the stock of  
 this association for the lands described herein, and that all assessments levied  
 against said stock by said association have been fully paid up to date.

\_\_\_\_\_  
 Secretary \_\_\_\_\_ Water Users' Association.

[CORPORATE SEAL.] \_\_\_\_\_

### OATH OF DISINTERESTEDNESS.

(Section 3745, U. S. Revised Statutes.)

I do solemnly swear that the copy of contract hereunto annexed is an exact  
 copy of contract made by me personally with \_\_\_\_\_ that I made  
 the same fairly, without any benefit or advantage to myself, or allowing any  
 such benefit or advantage corruptly to the said \_\_\_\_\_ or any  
 other person; and that the papers accompanying include all those relating to  
 the said contract, as required by the statute in such case made and provided.

Sworn to and subscribed before me at \_\_\_\_\_ this \_\_\_\_\_ day  
 of \_\_\_\_\_, 191

\_\_\_\_\_  
 Notary Public.

Recorded this \_\_\_\_\_ day of \_\_\_\_\_, 191\_\_\_\_, in Volume \_\_\_\_\_  
 Page \_\_\_\_\_, \_\_\_\_\_ Records of \_\_\_\_\_ County,  
 State of \_\_\_\_\_

\_\_\_\_\_  
 (Signature of officer.)

4-021.

FORM A.

DEPARTMENT OF THE INTERIOR.

### WATER-RIGHT APPLICATION.

Act June 17, 1902 (32 Stat., 388).

\_\_\_\_\_  
 U. S. LAND OFFICE, \_\_\_\_\_

SERIAL No. \_\_\_\_\_

## HOMESTEADS UNDER THE RECLAMATION ACT.

I, \_\_\_\_\_, do hereby apply for a water right under the \_\_\_\_\_ Unit, \_\_\_\_\_ Project, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat., 388) known as the

[SEAL.]

Reclamation Act, and the rules and regulations established thereunder, the water supplied in pursuance thereof to be used for the irrigation of, and to be appurtenant to, \_\_\_\_\_ acres of irrigable land, as shown on plats approved by the Secretary of the Interior, within the area described as follows:

\_\_\_\_\_ Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, \_\_\_\_\_ Meridian, an area of \_\_\_\_\_ acres; the said land having been entered by me under the said Reclamation Act by Homestead Application No. \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_

The quantity of water to be furnished hereunder shall be \_\_\_\_\_ acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land, \_\_\_\_\_ or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project: Provided, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land: Provided, however, that if measuring devices are not installed at the land, an increase, deemed reasonable by the Reclamation Service official in charge of the project, shall be made for losses of water after passing the point of measurement.

I agree to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior, namely, the sum of \$\_\_\_\_\_ per acre for \_\_\_\_\_ acres of irrigable land, \_\_\_\_\_ in \_\_\_\_\_ annual installments, and to pay promptly when due the annual installments and the maintenance and operating charges duly assessed against said land on account of said water right.

I further agree that, upon my failure to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

*This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior.*

If the Secretary of the Interior has made no contract with a water users' association organized under this project, I agree to file, upon his direction, evidence of membership in the water users' association organized under the said project; in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

And, being duly sworn, I further depose and say that I have made no application, now uncanceled, for a water right under said act of Congress, appurtenant to land now owned or claimed by me, except as follows:

Application No. \_\_\_\_\_, \_\_\_\_\_ Project, of \_\_\_\_\_ for \_\_\_\_\_, Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, \_\_\_\_\_ Meridian, an area of \_\_\_\_\_ acres and containing \_\_\_\_\_ acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in my own behalf and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly.

\_\_\_\_\_  
(Applicant sign here.)



State of \_\_\_\_\_ }  
 County of \_\_\_\_\_ } ss:

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 191

\_\_\_\_\_  
 (Official designation of officer.)

(SEAL.)

My commission expires \_\_\_\_\_

(The above affidavit may be sworn to before any officer authorized to administer an oath.)

IF THE SECRETARY OF THE INTERIOR HAS ENTERED INTO A CONTRACT WITH A WATER USERS' ASSOCIATION UNDER THE PROJECT, THE FOLLOWING CERTIFICATE MUST BE FILLED OUT:

\_\_\_\_\_, 191

I hereby certify that the applicant for this water right has duly subscribed, or is the successor in interest of one who has subscribed, for the stock of this association for the lands described herein, and that all assessments levied against said stock by said association have been fully paid up to date.

\_\_\_\_\_  
 Secretary of \_\_\_\_\_ Water Users' Association.

(CORPORATE SEAL.)

#### RECLAMATION—SHOSHONE PROJECT—WATER SUPPLY.

##### ORDER.

DEPARTMENT OF THE INTERIOR,  
*Washington, February 6, 1911.*

1. The instructions accompanying the public notices heretofore issued opening to irrigation lands in the Shoshone project, Wyoming, in pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), provide that the amount of water to be furnished to be stated in the second paragraph of each water-right application is three acre feet per acre per annum.

2. In accordance with such instructions the water-right application as executed by the water users reads as follows:

The amount of water to be furnished hereunder shall be three acre-feet of water per annum per acre of irrigable land as aforesaid measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; *provided*, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.

3. Experience has demonstrated that the quantity of water stated is in excess of the actual needs for beneficial use and that the application of the said quantity of water is having a detrimental effect upon the irrigated lands.

4. It is accordingly hereby ordered that the amount of water to be furnished hereafter shall not exceed two acre feet of water per annum per acre of irrigable land, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; *provided*, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.

R. A. BAILLINGER,  
*Secretary of the Interior.*

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RECLAMATION—SHOSHONE PROJECT—PAYMENT.

ORDER.

DEPARTMENT OF THE INTERIOR,  
*Washington, March 25, 1911.*

1. In pursuance of the act of Congress approved February 13, 1911 (Public—No. 353), entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section 4 of the Reclamation Act, and for other purposes," the following order is promulgated for the purpose of relieving the present situation on the Shoshone project, Wyoming, pending the issuance of public notice modifying or abrogating the notices heretofore issued.

2. Action looking to the concellation of entries and water-right applications for failure to make payments when due shall be deferred until December 1, 1911, and water will be furnished in the irrigation season of 1911 in all cases where payment is made on or before April 30, 1911, of all operation and maintenance charges which have heretofore become due and remain unpaid.

FRANK PIERCE,  
*Acting Secretary of the Interior.*

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OLIVER M. LEE.

*Decided March 2, 1911.*

SIoux HALF-BREED SCRIP—RIGHT OF ONE OF SEVERAL HEIRS TO LOCATE.

One of several heirs to a Sioux half-breed scrip right has no authority to locate the same without the consent and authority of the owners of the other interests.

PIERCE, *First Assistant Secretary Pierce:*

Oliver M. Lee, attorney in fact for Julia Renville, appealed from decision of the Commissioner of the General Land Office of November 22, 1910, refusing to reinstate his location of Sioux half breed scrip No. 397-A (duplicate), for forty acres, issued to William Ren-

ville, on the unsurveyed SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, T. 21 S., R. 10 E., N. M. M., Las Cruces, New Mexico.

April 1, 1909, Lee applied to make such location as attorney in fact for Francis G. Burke, attorney in fact for Julia Renville, claiming to be sole heir of William Renville, to whom the scrip was issued. March 25, 1908, Julia Renville, as sole heir of William Renville, to whom the scrip was originally issued, obtained issue of a duplicate, the original having been lost, and May 8, 1908, executed a power of attorney to Francis G. Burke, with power of substitution, authorizing Burke, or his substitute, to make location of the scrip. June 20, 1908, she revoked that power, and gave another to Thomas Mani, which was filed in the General Land Office with No. 397-D, alleging in the power to Mani that the original power to Burke was fraudulently obtained. June 9, 1909, the General Land Office held that by reason of her power of June 20, 1908, to Mani, all authority under her power to Burke was revoked.

In location of the scrip 397-D, evidence was submitted to the General Land Office that Julia Renville died December 23, 1908. Her estate was probated in Roberts County, South Dakota, and the court found the succession descended to Daniel Renville, son of William, and George Renville, grandson of William, the original scrippee. October 27, 1909, the General Land Office held that, as Julia Renville died before the location here in question, which was not made until April 1, 1909, Lee was without authority to locate the scrip, as the power given to Burke had ceased at Julia's death. The location was therefore canceled March 3, 1910.

September 1, 1910, the local office transmitted to the Commissioner application of W. A. Fleming-Jones, attorney of record for Lee, for reinstatement of the Las Cruces location, in support of which he furnished a "confirmation," in form of an affidavit by George Renville, and asks, in view of his continuous and diligent effort to secure proper evidence in the case, that the location be reinstated. Renville states in his affidavit that he adopts and ratifies—

as my own act, everything done by said Oliver M. Lee, in locating said land with said scrip, and in the improvement of said land, to the same extent as though originally done by me, and I hereby locate said scrip on said land, and I ask that said land be patented to the heirs of said William Renville, I being his sole heir, and the sole heir of said Julia Renville and the said Daniel Renville, deceased.

The Commissioner deemed this a sufficient application to locate the scrip by George Renville, as heir of Julia Renville. It has lately been shown in location of the scrip 397-D that Daniel Renville is dead and probate was had on his estate in Brule County, South Dakota, June 1, 1910, wherein the court found that the heirs at law of Daniel Renville were John Renville, aged nine, his son, and Eliza

Irvi, aged thirty, his daughter, who were entitled to the Sioux scrip 397-D, being sole heirs of Daniel Renville. The Commissioner required Jones within sixty days from notice to furnish evidence that George Renville is sole heir of Daniel, or to show that the other claimants, George Renville and Eliza Irvi also acquiesced in the location. In default of such acquiescence, the location was held for cancellation without further notice. The appeal is from this order, and counsel argue:

How can a guardian be compelled to concur in such ratification? We know of no law requiring or authorizing him to do so. Is it reasonable to hold that George Renville, owner of the largest interest, can be deprived of his rights because dependent upon the concurrence of that guardian and which might be refused? To impose such hardship upon him does not seem to be called for by the circumstances of this case nor a sound and reasonable construction of the laws and regulations governing it, especially as it is shown that he is acting in good faith for the benefit of all the heirs. It certainly would not be an unreasonable construction to assume that the act of one co-heir is the act of all in the absence of all protest or objection by any of the others, especially as the patent issues in the name of all the heirs.

The argument has no rational foundation. There appear to be three claimants to the estate—one owning a half and the two others a quarter each. The scrip is an indivisible property or right. All interested in it must authorize its location, or the land department has nothing before it upon which it can act. Were this not so, the scrip originally for a single forty acre tract would go on disintegrating into innumerable fragments, confusing public business in effort for its satisfaction. No authority is cited, nor is any known to the Department, that the owner of one interest may act without special authority to bind the owners of the other interests, or act for and conclude them. [See Peter Whitney, 38 L. D., 332.]

The decision is affirmed.

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**RED LAKE INDIAN LANDS—ACT FEBRUARY 16, 1911.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, March 3, 1911.*

REGISTER AND RECEIVER,

*Crookston, Minnesota.*

Gentlemen: 1. The act of Congress approved February 16, 1911 (Public—No. 382), a copy of which is herewith inclosed, provides that the undisposed of lands in that part of the diminished Red Lake reservation which was opened under the provisions of the act of February 20, 1904 (33 Stat., 46), shall be subject to homestead entry.

2. The price of the lands is fixed at \$4 per acre for all lands not heretofore entered, and for all lands embraced in canceled entries the price shall be the same as that at which they were originally entered. The money is payable one fifth at the time the entry is made, and the balance in five equal annual installments, due in one, two, three, four, and five years from the date of the entry, as provided in section 3 of said act of February 20, 1904. In addition to the foregoing, and the usual homestead fees and commissions, entrymen will be required to pay the drainage charge of three cents per acre, as fixed in the act of May 20, 1908 (35 Stat., 169).

3. It is further provided that where entries for these lands have been or shall hereafter be canceled pursuant to contests, the contestant shall have a preference right to enter the land embraced in such canceled entry, as provided in the act of July 26, 1892 (27 Stat., 270). Pursuant thereto, you will give notice to persons who have procured the cancellation of an entry for the lands under consideration of his preference right of entry within thirty days from notice, and upon his paying the fee required by law for giving such notice, you will permit him to enter the land. In the meantime, you will suspend all other applications for the land, as provided in Rule 2 of the Rules adopted September 15, 1910 (39 L. D., 217).

4. Entrymen for these lands will be required to comply with the terms and conditions of the homestead laws of the United States, as modified by said act of February 20, 1904, and an entry is subject to cancellation for failure to do so, or for failure to make the annual payments promptly.

5. Below is given a list of vacant lands taken from the list furnished with your letter of September 20, 1910, modified to agree with the records of this office. There has been noted in certain cases the price which former entrymen bid for the lands, as well as the value of Indian improvements reported to have been on certain tracts in 1904, the price of which is included in the price of the land, the same as at the sale of 1904.

T. 151 N., R. 39 W.

Lots 1, 2, 3, 5, 6, 7, Sec. 1; Lots 1, 3, 4, 5, 6, 8, 9, Sec. 2; Lots 1, 3, 4, 7, 10, Sec. 3; Lots 5, 6, Sec. 4.

T. 152 N., R. 39 W.

Lots 1, 2, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Lots 3, 4, S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 1; SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Lots 6, 5, N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 3; Lots 1, 2, 3, 4, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Lot 9, S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 4; Lots 2, 3, 4, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Lots 10, 6, 7, 8, 9, 5, NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 5; Lot 2, SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Lots 10, 11, 12, 13, Sec. 6; SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Lot 2, NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 7; E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Lots 1, 2, Sec. 8; Lots 1, 2, 3, 7, 8, SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 9; Lots 1, 4, 5, 6, 7, Sec. 10; Lots 3, 4, 8, 11, Sec. 11; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 12; SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ .

SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 13; NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 14; NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 15; NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 16; NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 17; S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18; NE.  $\frac{1}{4}$ , Lots 3, 4, Sec. 19; All of Sec. 20; NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 21; NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 22; NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 23; SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 24; NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 25; NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 26; N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 27; N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 28; Lots 1, 2, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 30; Lots 7, 11, 13, NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 31; NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Lot 4, Sec. 32; NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Lot 2, Sec. 33; N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 34; SW.  $\frac{1}{4}$ , Sec. 35; NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 36.

T. 153 N., R. 39 W.

All of Sec. 1; Lots 1, 2, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 2; All of Sec. 3; Lots 1, 2, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 4; S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 10; NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 11; NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 12; All of Sec. 13; NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 14; SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 15; N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 20; SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 21; NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 22; All of Sections 23, 24, 25, 26 and 27; NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 28; W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 29; W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Lot 4, SE.  $\frac{1}{4}$ , Sec. 30; NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Lot 1, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 31; NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 32; E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 33; W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 34; All Sections 35 and 36.

T. 154 N., R. 39 W.

Lots 5, 6, 7, 8, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 1; Lots 5, 6, 7, 8, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 2; Lots 5, 6, 7, 8, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 3; Lots 5, 6, 7, 8, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 4; Lots 5, 6, 7, 8, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 5; Lots 5 to 11 inc., SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 6; NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 7; NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 8; All of Sec. 9; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 10; NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 11; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 12; NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 13; NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 14; NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 15; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 16; NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 17; NE.  $\frac{1}{4}$ , Lot 3, NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 18; NE.  $\frac{1}{4}$ , Sec. 21; SE.  $\frac{1}{4}$ , Sec. 22; NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 24; SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 25; NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 26; NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 27; SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 28; SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 29; SE.  $\frac{1}{4}$ , Sec. 30; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 32; SE.  $\frac{1}{4}$ , Sec. 33; SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 36.

T. 152 N., R. 40 W.

NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 4; Lots 1, 2, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 5; Lots 5, 6, Sec. 6; Lots 1, 4, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 7; NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 12; SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 13; Lots 1, 2, SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18; Lot 1, Sec. 19; W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 20; SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 21; SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 23; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 24; Lots 1, 2, 3, 4, NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 25; Lots 1, 2, Sec. 26; Lots 1, 2, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 30; Lot 3, Sec. 32; Lot 1, Sec. 36.

## T. 153 N., R. 40 W.

SE.  $\frac{1}{4}$ , Sec. 4; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 15; S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 23; SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 25; Lots 3, 5, 6, NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  (all at \$7.20 per acre, and Indian improvements valued at \$135). Sec. 28; Lots 3, 4, E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 31; SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 35; NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 36.

## T. 154 N., R. 40 W.

Lots 1, 2, 3, 4, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 1; Lots 1, 2, 3, 4, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 2; Lots 3, 4, 5, SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Lots 1, 2, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 6; SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 10; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 11; N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 12; NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 13; All of Sections 14 and 15; NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 16; NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 22; All of Section 23; W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 24.

## T. 155 N., R. 40 W.

Lots 8, 9, 10, 11, Sec. 31; Lots 5, 6, 7, 8, Sec. 35.

## T. 152 N., R. 41 W.

Lots 1, 2, E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 1; Lots 3, 4, Sec. 6; NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 8; SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 9; S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 12; SE.  $\frac{1}{4}$ , Sec. 13; S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 14; SW.  $\frac{1}{4}$ , Sec. 15; NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 16; SE.  $\frac{1}{4}$ , Sec. 17; NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 19; SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  (\$5.10 per acre), Sec. 22; NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 23; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 24; NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 25; N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 36.

## T. 153 N., R. 41 W.

SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 28; SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 29; Lots 1, 2, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 30; E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 33; SW.  $\frac{1}{4}$ , Sec. 34.

## T. 154 N., R. 41 W.

Lots 1, 2, S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 1.

## T. 155 N., R. 41 W.

Lots 5, 6, Sec. 36.

## T. 153 N., R. 42 W.

Lots 1, 2, 3, NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , (Indian improvements valued at \$55.00), Sec. 14; lot 5, sec. 28.

## T. 154 N., R. 43 W.

NW.  $\frac{1}{4}$  (\$5.30 per acre), Sec. 25.

6. In view of the provisions of the Act of February 16, 1911, office letter of October 18, 1909, instructing you to discontinue the allowance of homestead entries for these lands, and departmental letter of October 12, 1910, postponing the public sale of the undisposed of lands pending legislation, are hereby recalled, to take effect, as to settlement on the lands, on April 15, 1911, and as to the allowance of entries, on May 15, 1911. No rights will be gained by settling on the lands prior to April 15, 1911. You will give information of this

restoration to the newspapers as a matter of news, but not as an advertisement.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

R. A. BALLINGER,  
*Secretary.*

(PUBLIC—No. 382.)

An act authorizing homestead entries on certain lands formerly a part of the Red Lake Indian Reservation, in the State of Minnesota.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter all lands ceded under the act entitled "An act to authorize the sale of what is known as the Red Lake Indian Reservation, in Minnesota," approved February twentieth, nineteen hundred and four, and undisposed of, shall be subject to homestead entry at the price of four dollars per acre, payable as provided in section three of said act, for all lands not heretofore entered; and for all lands embraced in canceled entries the price shall be the same as that at which they were originally entered: *Provided*, That where such entries have been or shall hereafter be canceled pursuant to contests, the contestant shall have a preference right to enter the land embraced in such canceled entry, as prescribed in the act of July twenty-sixth, eighteen hundred and ninety-two: *Provided further*, That all lands entered under this act shall, in addition to the payments herein provided for, be subject to drainage charges, if any, authorized under the act entitled "An act to authorize the drainage of certain lands in the State of Minnesota," approved May twentieth, nineteen hundred and eight. (Twenty-seventh Statutes, page two hundred and seventy.)

Approved, February 16, 1911.

**COAL LANDS—WITHDRAWALS—SURFACE RIGHTS—ACTS OF JUNE 22 AND  
25, 1910, AND MARCH 3, 1909.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
*Washington, March 6, 1911.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: The act of June 25, 1910 (36 Stat., 847), provides that the President may at any time in his discretion temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water power sites, irrigation, classification, or other public purposes to be specified in the orders of withdrawal, such withdrawal to remain in force until revoked by him or by an act of Congress.

Section two of the act provides that lands so withdrawn shall at all times be open to exploration, discovery, occupancy and purchase



under the mining laws, excepting those relating to coal, oil, gas and phosphates, there being a further provision, however, to the effect that the order of withdrawal shall not impair or affect the rights of any person who, prior to the date of the withdrawal, is a *bona fide* occupant or claimant of oil, or gas, bearing lands and who at such date is in diligent prosecution of work leading to the discovery of oil or gas. No hard or fast rule can be established fixing the amount of work which must have been done by the occupant prosecuting work leading to the discovery of oil or gas. Each case must rest upon its own showing of diligence when application for patent is filed.

The chief of field division should be advised of all such applications and should be prepared to submit showing, if possible, before the issuance of final certificate of entry.

This section contains further provision to the effect that there shall be excepted from the force and effect of any withdrawal all lands which are on the date of withdrawal embraced in any lawful homestead, or desert-land entry theretofore made or upon which any valid settlement has been made, and is at that time being maintained and perfected pursuant to law. Applications to make nonmineral entries by settlers claiming the benefits of the above-mentioned provisions of section two, will be referred to the chief of the appropriate field division for investigation and report before final action is taken thereon.

Withdrawals provided for under this act include those made for the purpose of classifying coal lands, and it seems that after the passage of this act the previous coal withdrawals were renewed thereunder.

The act of March 3, 1909 (35 Stat., 844), is for the protection of surface rights of nonmineral entrymen where the lands were subsequently classified, claimed, or reported as being valuable for coal, and the act of June 22, 1910 (36 Stat., 583), provides for the allowance of certain nonmineral entries for land having been withdrawn or classified as coal lands. These acts have separated the surface from the coal deposits for the purpose of allowance of certain nonmineral entries, and it is not believed that the act of June 25, 1910, under consideration, was intended to repeal said acts. Therefore, where applications are presented to make final proof on nonmineral entries made prior to withdrawal, for the purposes of classifying the coal deposits, the disposition of such applications should be made with especial reference to the provisions of the act of March 3, 1909, *supra*, and as to such lands certain nonmineral entries may be allowed, as provided for by the act of June 22, 1910, *supra*, notwithstanding their withdrawal under act of June 25, 1910.

Mineral applications for mining claims perfected upon oil, gas, or phosphate lands prior to withdrawal, or for such claims upon

lands chiefly valuable for other minerals, whether perfected before or after withdrawal, or for claims of the latter class within power-site withdrawals, and applications to submit final proof upon homestead, desert-land, and settlement claims initiated prior to a withdrawal, will be referred to the chief of field division, with the appropriate notation of the character of the withdrawal involved, in accordance with the practice under paragraphs five *et seq.* of the circular of April 24, 1907 (35 L. D., 681), for field examination and full report of all facts touching the character of the land and affecting the validity of the location, claim, or entry, as the case may be, including the possibility of water power development, if any.

In the administration of the act hereunder, you will also be governed by the circular approved January 27, 1911, relative to cooperation between the Geological Survey and the General Land Office.

It is believed that the foregoing will enable you to properly advise the local officers in all matters necessary to put this act into operation; and where an application is received not specifically provided for herein, you will act upon the same affording aggrieved parties the usual right of appeal.

Very respectfully,

R. A. BALLINGER,  
*Secretary.*

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### UNITED STATES MINING CO. v. WALL.

*Decided March 6, 1911.*

#### CONFLICTING MINING CLAIMS—LOCUS OF CLAIM.

The position of conflicting mining claims, and their positions with relation to each other, must be determined as the claims are defined and established on the ground, and all errors of description of the position of any of the claims, and of conflicts among them, must give way thereto.

#### PIERCE, *First Assistant Secretary:*

In February, 1903, Enos A. Wall filed his application for patent to what is called the Nemesis lode mining claim, survey No. 4857, with an area of 1.887 acres, in the Salt Lake City, Utah, land district, against which the United States Mining Company filed its protest, alleging a conflict to the extent of 1.045 acres with the unpatented Grizzly lode claim, owned by the company.

The applicant later eliminated 1.030 acres as the conflict area in question, according to an amended survey of the Grizzly (hereinafter mentioned), and on December 3, 1908, made a formal entry (No. 01076) of the remainder of his claim.

This was followed by a further and informal protest on behalf of the company, upon the ground that the entry so made is wholly

in conflict with, and the entered area wholly embraced within, the patented Fairview and Northern Light lode claims, also owned by the company; that is, that the entry included no public land, but only land held in private ownership.

The question appearing to the Commissioner of the General Land Office, from the plats of the several mineral surveys on file in his office, to be confused, he called upon the surveyor-general for Utah to report the net area of the Nemesis claim—that is, after deducting all conflicts—as shown by his records. Using for that purpose the table of areas given in the field notes of the Nemesis survey, and, as the basis of the computation, deducting the area in conflict with the Northern Light lode, survey No. 53, not in conflict with the Grizzly lode, survey No. 52; the Fairview lode, survey No. 54; the Grizzly lode amended, survey No. 52; and the Kingston Co., survey No. 3557, after excluding the area in conflict with the Fairview and Northern Light lodes, the surveyor-general reported a conflict of 1.025 acres with the Grizzly lode amended, of 0.024 acres with the Northern Light, of practically nothing with the Fairview, and of 0.005 acres with the Kingston Co. lode, leaving to the Nemesis a net area in acreage of 0.883. The entry was thereupon amended to conform thereto, and on October 27, 1910, was approved for patenting.

From that judgment of approval the protestant company has appealed to the Department.

In urging a reversal, appellant contends that the entered area and the so-called discovery of the Nemesis lode are wholly within the limits of the patented Northern Light claim, and embrace or involve no public land, and that title to the land included in the entry was quieted in appellant under the decree directed by the Circuit Court of Appeals, Eighth Circuit, in the case of *United States Mining Co. v. Lawson et al.* (134 Fed., 769), and affirmed by the Supreme Court of the United States (207 U. S., 1).

Appellee, on the other hand, whilst generally controverting appellant's contention on the merits, directly challenges the second and informal protest as wholly irregular, and urges that no question raised thereby or thereunder should be considered.

First with reference to the decree above cited, it is apparent to the Department, from a careful examination of the respective statements of the case and the opinions made and rendered by those courts, and as well the transcript of the record therein, that the precise question upon the merits in this proceeding was not there raised upon the pleadings or judicially considered. The bill of complaint in that case, filed by the company which is the appellant here, first averred its ownership of the Northern Light, Fairview, and Grizzly claims, and another adjoining, the positions of which were indicated

by diagrams laid before the courts, and that beneath the surface thereof the defendants (of whom this appellee is apparently one) had wrongfully entered and had removed valuable ore therefrom. But the issue, upon the further averments of the bill and answer, arose upon the defense that the ore so removed was mined from the dip of a distinct vein apexing within a mining claim in the possession of the defendants and known as the Kempton, adjoining the aforesaid group at the south; and from the evidence it was decided that the apex within the Kempton claim was not the apex of a distinct vein extending beneath the above group, but only of part of a broad vein also apexing within the adjacent Mountain Gem and Old Jordan claims, which were senior to the Kempton and were also the property of complainant, in accordance with the further averments of the bill. Pursuant to the established principle that in the case of such a longitudinal bisection of the apex of a vein the senior location has the extralateral right for the full width of the vein upon its dip, the decree was passed in favor of the complainant. As the Department understands it, this has left open for determination the question whether a piece of ground, containing the apex of an independent vein, has been left vacant and available within the limits of the group, as appellee contends, and within the boundaries of his Nemesis location.

In the same connection, and with respect to appellee's challenge of the informal protest, it is the view of the Department that it is both its right and its duty to determine whether the area included in the amended Nemesis entry is lawfully subject to that entry and to patent thereunder, or whether it has already passed by patent, as the appellant contends, beyond the jurisdiction of the land department. In the latter event it is clear that appellant should not be made to suffer such a cloud upon its title as would be cast by the entry and patent for the Nemesis claim, and the land department would be wholly without authority to grant them.

Passing, therefore, to the merits, the material facts are these:

About 1873 (the date is not given in this record) the Fairview, Northern Light, and Grizzly claims were delimited by separate and successive mineral surveys (as their numbers indicate), and the two first named were soon carried through to patent, the Northern Light, of particular concern here, on May 15, 1875.

The Northern Light patent contains the usual clauses of description or definition of that claim for the purpose of the grant, including a mention and description of the established monuments upon the ground and reciting the course and distance of the tie line (to a neighboring mineral monument) and of each boundary line of the claim. The recitals of the courses and distances of those boundaries include specific mention of points of intersection thereof with the

side lines of the Grizzly claim, and the description concludes with the following clause of exclusion:

Excepting and excluding, however, all that portion of the surface ground hereinbefore described, which is embraced by the survey made for the Grizzly mining claim.

The patent application for the Grizzly claim, however, although filed at about the same time, was not prosecuted to entry, but remained merely pending until but a few years ago, when it was formally rejected, by order of the Commissioner, in order to clear the records. It would then seem that the appellant company desired to renew the application (perhaps because of the fact of the Nemesis location), as one of the conditions of which the Commissioner required an amended survey of the Grizzly; and such a survey was undertaken and made. When thereafter, according to the calls returned in the field notes of that survey, the Grizzly claim was platted in conjunction with the patented Northern Light (the other patented claims need not now be considered), the Grizzly was made to appear to occupy a position something less than 100 feet farther to the south or southeast, with relation to the Northern Light, than as it was platted from the first survey of the claim.

The plat and field notes of an amended survey of the Nemesis claim, made in 1909, disclose that that claim is substantially inclosed by the boundary lines of the Northern Light claim, as the latter are traced upon the same plat, the Nemesis' westerly boundary slightly overlying the like boundary (side line) of the Northern Light, thus creating an insignificant conflict with the Fairview claim and a very small one with the Kingston Co., but both of which have been eliminated from the Nemesis entry. Relying upon the exclusion from the Northern Light patent in favor of the Grizzly claim, it is an area lying between the two side lines of the Northern Light claim, in the one direction, and in the other direction lying between what was platted as the northerly and intersecting side line of the Grizzly under its first survey and the changed position (farther to the south, as above explained) in which that line is platted pursuant to the later or amended survey, which is claimed under the Nemesis location and entry.

If the facts were that after the issuance of the Northern Light patent, with its exclusion of conflict with the Grizzly claim as the latter then stood, the position of the Grizzly had, by a new or amended location, been actually shifted on the ground in such a direction as to vacate and abandon in whole or in part the area theretofore excluded in its favor, the abandoned area would have been available for such an appropriation as has been attempted under the Nemesis location, if the requisite discovery were made and in other respects the law were complied with.

According to the record, however, that is not the case here. Not only is there no suggestion of any such change in the Grizzly location, but in the field notes of the second or amended survey of that claim it is expressly stated that the purpose is to correct the connection to the mineral monument and to show the correct conflicts with the other surveyed claims; and it is thereupon further expressly stated that corner No. 1 of the claim (from which the tie line is again run) is identical with corner No. 1 of the original survey. The boundaries were taken from the calls of that first or original survey. It thus appears that the variance in the respectively indicated positions of the Grizzly results wholly from a variance in course and distance between the tie lines returned under the original and under the amended surveys.

Whether, therefore, the relative positions of the Northern Light and Grizzly claims, as they have constantly existed upon the ground, be as represented according to the returns of the original survey, or as indicated by the returns of the amended survey of the Grizzly, the result is the same. The exclusion from the Northern Light patent, whilst described by specific mention of points of intersection of the lines of the respective claims, was expressly of the surface ground "which is embraced by the survey made for the Grizzly mining claim." As far as either or all of the surveys are concerned, the position of each claim, and their relative positions, must be determined as the claims are defined and established upon the ground, and all errors of description of the position of either claim, and of the conflicts between them, must give way thereto, in accordance with the rule in the case of *Sinnott v. Jewett* (33 L. D., 91). Indeed, it is plainly evident that it was the intention in this case to exclude from the Northern Light claim the actual, and not a theoretical, conflict with the Grizzly.

With the elimination of the particular conflict areas which are specifically excluded from the Nemesis entry as approved by the Commissioner, it follows from the foregoing that the area remaining long ago passed to patent as part of the Northern Light claim, and that the approval of that entry was erroneous.

The judgment of the Commissioner is reversed, and the entry will be canceled.

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WALTER T. CLARK.

*Decided March 7, 1911.*

SOLDIERS' ADDITIONAL LOCATION—APPROXIMATION—DE MINIMUS NON CURAT LEX.

The rule of approximation must be strictly observed in the location of soldiers' additional rights, and it will not be extended by permitting application of the principle *de minimus non curat lex* to bring a claim within the rule.

PIERCE, *First Assistant Secretary*:

Walter T. Clark has filed motion for review of departmental decision of December 13, 1910 (not reported), affirming a decision of the Commissioner of the General Land Office rejecting his application to enter the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 17, T. 163 N., R. 83 W., Minot, North Dakota, land district, containing forty acres, under section 2306, R. S., based on the claimed soldiers' additional right of 19.52 acres, as assignee of Resse P. Kendall.

The application was rejected for the reason that it would be a violation of the rule of approximation to allow forty acres to be taken with the amount of the additional right assigned, as the additional right is less than half the area of the land applied for.

It is observed that the excess is slightly less than one acre more than the deficiency. If the additional right presented were about one-half acre more than the amount tendered, the application would come within the rule of approximation.

The rule of approximation, as stated in the case of Richard Dotson (13 L. D., 275), which involved the location of a single soldiers' additional right, is as follows:

A soldier's additional homestead entry can not be allowed for a tract the area of which when added to the land covered by the original entry exceeds one hundred and sixty acres by a greater amount than the area required to make up the deficiency.

The principle or practice of allowing approximation is not an absolute right established by statute but is an administrative rule founded in necessity in the disposal of the public lands occasioned by the irregularity in area of the legal subdivisions established by survey. Little, if any, necessity for application of the rule exists in the case of an assignee of a soldiers' additional right since the decision in the case of Ole B. Olsen (33 L. D., 225), which permitted an assignee to combine in one application the assigned rights of two or more soldiers and to locate such rights upon the same body of land, and, as to such cases, a new rule of approximation was laid down in the case of George E. Lemmon (36 L. D., 417), in the following words:

It is considered that as the necessity does not exist where the applicant assignee seeks to locate two or more fractional portions of different soldiers' additional rights upon one body of land, the reason for the rule in a measure ceases, and in applying the rule of approximation to such a case, the rights will be severally considered, and where the excess amount applied for is less than the average of the rights sought to be used the entry may be allowed.

This claimant is not merely asking that the old rule of approximation be applied but he goes further and invokes the aid of the principle *de minimis non curat lex* to eke out his claim and bring it within the

rule. He sites two unreported departmental decisions, hereinafter designated, which permitted this to be done. He also cites other decisions reported, which, however, are not considered in point. The unreported decisions cited which permit a body of land to be taken with an assigned soldiers' additional right where the area applied for was twice as great as the additional right presented, were prior to the decisions in the case of Olsen and Lemmon, *supra*. Settlement claims thus violating slightly the rule of approximation may have been allowed in some few instances for some good and sufficient reasons where the settler was applying in person. But as above stated, where the applicant is a purchaser of the rights of other persons and is given the privilege of combining the rights sufficient to make up the required amount, there certainly exists no peculiar or unusual reason for a further extension of a rule already liberal and equitable. The Department would be more inclined to do away altogether with the rules of approximation in cases of assigned soldiers' additional rights than to extend same beyond those announced in the cases of Dotson and Lemmon, *supra*. As this claimant has not an additional right sufficient to bring his claim within the rule as stated in the case of Dotson, he can only perfect same by furnishing other additional right or rights so that the aggregate rights will be sufficient to satisfy the rule as stated in the Lemmon case.

The unreported decisions in the case of Marsh, assignee of Davids, April 20, 1904, and in the case of Ashton, assignee of Patterson, July 18, 1904, cited by claimant, will not be followed.

The former decision in this case is adhered to and the motion is accordingly denied.

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**RULE 10 OF PRACTICE AMENDED—PUBLICATION OF NOTICE OF CONTEST.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
*Washington, March 7, 1911.*

**THE COMMISSIONER OF THE GENERAL LAND OFFICE.**

SIR: Rule 10 of the amended Rules of Practice is hereby amended to read as follows:

RULE 10. Service of notice by publication shall be made by publishing notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be printed in such county, then in a newspaper printed in the county nearest to such land.

Very respectfully,

R. A. BALLINGER,  
*Secretary.*



## ALASKA SURVEYS—ACT JUNE 25, 1910.

## INSTRUCTIONS.

## DEPARTMENT OF THE INTERIOR

*Washington, March 9, 1911.*

## THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I am in receipt of your communication of February 25, 1911, transmitting proposed regulations concerning the survey of lands in Alaska under the appropriation contained in the act of June 25, 1910 (36 Stat., 703, 741). The system of public land surveys was extended to Alaska by the act of March 3, 1899. The said act of June 25, 1910, appropriated \$100,000 for the surveying of lands of the United States in the said district.

You express the view that sufficient authority exists for the expenditure of said appropriation in the making of surveys of isolated claims under the homestead and other laws by metes and bounds irrespective of the regular survey system. Prior to said act claimants were required to make survey of their claims at their own expense. You not only take the view that authority exists for the making of such surveys at the expense of the Government, but also represent that it would be to the public interest to do so as it is as expensive to the Government to make examination of the surveys now being made at the expense of claimants as it would be to survey the claims in the first instance at the expense of the Government.

The Department is unable to concur in your conclusion that authority exists in the said act for applying the appropriation therein to the cost of surveys other than regular surveys in accordance with the rules which obtain in the States. One provision of the act reads as follows:

For the survey of the lands of the United States in the district of Alaska, one hundred thousand dollars. The foregoing surveys in Montana, Idaho, Utah and Alaska shall be made in accordance with the provisions herein for surveys and resurveys of public lands.

Some of the provisions referred to are that the appropriation for surveys under the act shall be expended, first, in surveying townships occupied in whole or in part by actual settlers and the lands granted to the States by certain acts mentioned; and second, in surveying lands, among others, adapted to agriculture and lands deemed advisable to survey on account of availability for irrigation or dry farming.

The fragmentary surveys mentioned in your letter as being provided for by the act and which you consider as an indication of authority for the expenditure of money for the surveying of claims by metes and bounds irrespective of the rules governing the survey of public lands generally, are clearly not of the character which you

propose to make under the said appropriation. Undoubtedly the main purpose of the appropriation was for the extension of the regular public land surveys, preference being given to certain classes of land designated therein, and there is nothing to indicate that the surveys in Alaska under the appropriation should be of a different character from those in the States. On the contrary, it is clearly apparent that they must be the same. Even if authority were found for the expenditure of the money as suggested, it is not considered that it would be advisable to so expend it. It seems reasonable to suppose that if the proposed policy of making isolated surveys of homestead and other claims out of said appropriation were adopted the number of such claims would be greatly augmented and the entire appropriation might thus be expended without in the least extending the system of regular surveys. This surely would not be to the ultimate advantage of the public. In making surveys under the act those townships occupied in whole or in part by actual settlers are among the class first preferred. This will give settlers a fair chance to have their claims surveyed under the act and will at the same time accord with the economic policy involved in making the surveys regular and covering in any one survey no inconsiderable area. The surveying of isolated claims by metes and bounds, as now permitted at the expense of claimants, with no view of having same conform to the lines of the regular public surveys when extended, would not advance but would rather hinder the regular surveys, and certainly this would not be a wise expenditure of public money.

I must therefore withhold approval of the regulations forwarded by you providing for the making of such surveys at Government expense. I have approved the other recommendation to have the surveyors in charge of surveying parties designated as special disbursing agents for the purpose of facilitating the payment of accounts for expenditures in the district of Alaska, and also the proposition to endeavor to obtain from the Secretary of the Treasury permission for the said agents to defer making their quarterly accounts until the surveying season is over and they have returned to the States.

Very respectfully,

R. A. BALLINGER,  
*Secretary.*

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ANNA R. KEAN.

*Decided March 11, 1911.*

**SIoux HALF-BREED SCRIP—NOT TRANSFERABLE.**

In view of the statutory inhibition against the transfer or conveyance of Sioux half-breed scrip, there can be no valid power to locate such scrip coupled with an interest.

## POWER OF ATTORNEY TO LOCATE—AUTHORITY OF SCRIPPER TO REVOKE.

At any time before location and sale of the land the scrip may revoke a power of attorney given by him to locate such scrip, whether the attorney in fact has notice of the revocation or not; and while the land department may, for good and sufficient reasons, refuse to allow the scrip to change or abandon a location, the attorney in fact can not as a matter of right insist that a location made under good and sufficient powers shall be approved in opposition to the wish of the scrip, as every act of the attorney under such powers must be for the use and benefit of the scrip.

PIERCE, *First Assistant Secretary*:

This appeal is filed by Anna R. Kean from a decision of the General Land Office rejecting location of 160 acres of unsurveyed land "approximately in what will be when surveyed T. 4 S., R. 16 E., S. & G. R. B. & M." with Sioux half-breed scrip under alleged powers of attorney from Harriet Ange, the scrip.

The scrip was issued to Harriet Ange November 24, 1856, for 160 acres of land, under the act of July 17, 1854 (10 Stat., 304), which provides that "no transfer or conveyance of any of said certificates or scrip shall be valid." Application was made May 21, 1878, to locate said scrip upon lands in Illinois by Sextus N. Wilcox, under powers of attorney from Harriet Ange authorizing him to locate said scrip and to sell and reconvey the lands located therewith by proper deeds of conveyance. The application was allowed July 8, 1878.

June 10, 1878, after the filing of the application to locate said land, the said Wilcox, as attorney in fact for Harriet Ange, sold and conveyed the land applied for to George G. Wilcox.

The lands located with said scrip appeared upon township plat of survey to be public lands lying within the original meander line of Calumet Lake. But it was subsequently found that at the time of the original survey they were submerged by a navigable body of water and the survey was set aside and the entries of such lands were canceled March 30, 1880, including the land located by S. N. Wilcox, as attorney in fact for Harriet Ange, and the scrip was returned to said Wilcox.

The question as to the right and title to the scrip came before the Department in 1908 upon the appeal of Anna R. Kean from a decision of the General Land Office holding that the duplicate of said original scrip, which had been issued by the General Land Office, operated as a cancellation of the original scrip and should be returned to Harriet Ange.

It was then claimed by Anna R. Kean that the purchase of the land was made by George G. Wilcox as her trustee and that as the scrip had full authority to convey the land after it had been located, the right and title to the scrip which was then in her, the said Anna R. Kean's, possession became her absolute property upon

the cancellation of the entry, it having become merged in the land by location.

The Department, by decision of February 24, 1908, held that as the original scrip was in existence there was no authority to issue a duplicate, and it was ordered that said duplicate be canceled. It further held that a void location did not abrogate the statutory inhibition against the conveyance or transfer of said scrip and that the scrip when located must be in the name of Harriet Ange. No decision, however, was made as to who would be the beneficiary under that location.

The location in question was made by Frank M. Leland, as attorney in fact for Harriet Ange, under a power of attorney executed by Harriet Ange February 24, 1883, empowering him to locate said scrip and to surrender to the United States all lands theretofore located or attempted to be located with said scrip, revoking all former powers of attorney.

There can be no valid power to locate Sioux half-breed scrip coupled with an interest, for the reason that it would be in violation of the statutory inhibition against the transfer or conveyance of said certificate or scrip (*Felix v. Patrick*, 145 U. S., 317): hence the scribee may at any time before location and sale of the land revoke the power, whether the attorney in fact had notice of the revocation or not, as every act of his under such power must be for her own use and benefit.

While the land department may, for good and sufficient reasons, refuse to allow the scribee to change or abandon a location, the attorney in fact can not as a matter of right insist that a location made under good and sufficient powers shall be approved in opposition to the wish of the scribee.

The decision of the General Land Office is affirmed.

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ACCOUNTS—CANCELLATION FEES—ACT MARCH 4, 1911.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, March 11, 1911.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: Your attention is called to the following act, approved March 4, 1911 (Public—501):

An Act for the relief of registers and former registers of the United States land offices.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, to registers and former registers of

United States land offices money earned by them for issuing notices of the cancellation of entries subsequent to July twenty-sixth, eighteen hundred and ninety-two, which money, under the instructions of the Secretary of the Interior, they were erroneously required to deposit in the United States Treasury, contrary to the provisions of the act approved July twenty-sixth, eighteen hundred and ninety-two: *Provided*, That such refund shall be made only of money deposited subsequent to the approval of the act of July twenty-sixth, eighteen hundred and ninety-two, and shall be made upon accounts stated and certified by the Secretary of the Interior: *And provided further*, That said refund shall be made of only such fees which have not entered into the compensation paid to such registers out of the appropriation for salaries and commissions of registers and receivers for any fiscal year.

SEC. 2. That hereafter all money or fees received or collected by registers of United States land offices for issuing notices of cancellation of entries shall be reported and accounted for by such registers in the same manner as other fees or moneys received or collected.

Approved, March 4, 1911.

Section 2 thereof provides that hereafter all cancellation fees shall be reported and accounted for in the same manner as other fees or moneys received or collected.

Paragraph 11 of the circular of May 16, 1907 (35 L. D., 571), is thereby revoked.

In accordance with section 2 of said act, all cancellation fees that have been received since March 4, 1911, must be deposited by the receiver to the credit of the Treasurer of the United States, the same as all other fees received at local land offices. These fees must be reported on the "Abstract of Fees Collected for Reducing Testimony to Writing, Transcripts of Records, Plats, etc.," and receipts issued therefor as in other cases.

Hereafter, when the register is ready to issue a cancellation notice he will advise the proper person to pay to the receiver of public moneys the fee provided therefor. Upon receipt of the fee by the receiver the cancellation notice may issue. If the fees are paid to the register, he must immediately turn same over to the receiver, who will issue receipt on the day the fee is received, and properly account therefor.

Please acknowledge receipt of this circular on inclosed postal card.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

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HOOBLER v. TREFFRY.

*Decided March 11, 1911.*

DESERT LAND ENTRY—EXTENSION OF TIME FOR FINAL PROOF—ACT OF MARCH 28, 1908.

The filing of a contest against a desert land entry during the pendency of an application for extension of time under the act of March 28, 1908, will not

prevent the allowance of such application where the contest affidavit does not charge facts tending to overcome the *prima facie* showing of right to the extension set forth in the application.

DISCRETION OF COMMISSIONER IN MATTER OF EXTENSION OF TIME.

The right to an extension of time within which to submit final proof upon a desert land entry, accorded by the act of March 28, 1908, is fixed by the act itself, upon a proper showing of facts bringing a case within its provisions, and is not a mere privilege resting in discretion of the Commissioner to allow or deny; his discretion under the act being limited to fixing the time or period of the extension.

PIERCE, *First Assistant Secretary*:

Appeal is filed by Alsadie L. Hoobler from decision of October 26, 1910, of the Commissioner of the General Land Office, reversing the action of the local officers and dismissing the contest of said Hoobler initiated January 15, 1910, against the desert land entry made by Silas D. Clifford November 20, 1905, and assigned by him November 17, 1906, to George Treffry, for the W.  $\frac{1}{2}$ , Sec. 34, T. 4 S., R. 6 E., Boise, Idaho, land district, the Commissioner holding that said contest is disposed of by the allowance, in said decision, to said assignee of an extension of time for three years from November 20, 1909, date of expiration of said entry, within which to make final proof thereunder, as provided in the act of March 28, 1908 (35 Stat., 52).

Application, duly corroborated, for such extension was made by said assignee December 2, 1909, setting forth that he, on his obtaining this entry by assignment, purchased in good faith for a consideration of \$4,000 from the Great Western Beet Sugar Company, a corporation organized under the laws of the State of Washington and doing business in the State of Idaho, a water right for sufficient water for the irrigation of said land; that because of mismanagement of said company by its secretary and general manager, the company has been placed in receivership, and the receiver is now in control, planning to continue business through other management; and that said assignee was, therefore, without fault on his part, and because of such unavoidable delay in securing water under his said purchase, unable to make final proof of reclamation and cultivation within the lifetime of said entry, as required by law.

The local officers transmitted said application, with their approval for allowance.

The contest affidavit herein, corroborated by one witness, charges:

That the said Silas D. Clifford and George Treffry, or either of them, has not expended Three Dollars (\$3.00) per acre in the necessary irrigation, reclamation and cultivation thereof by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of valid water rights for the irrigation of the same; nor have they done any work on the land toward the irrigation, reclamation and cultivation thereof, and have made no expenditures in good faith for the purchase of valid water rights for the irrigation of the same; that the said land is in its natural arid state, covered with sage-brush.

Hearing was duly had herein upon an agreed statement of facts, sufficiently appearing in said decision appealed from. Said statement finds as a fact that, while there was no reclamation, irrigation, improvement or cultivation of these lands, said assignee had made said purchase of a supposed water right "in good faith with the intent of reclaiming said land and of the improvement and cultivation thereof," and also finds facts in themselves indicating the good faith of said assignee in attempting to reclaim, improve and cultivate the land, by purchasing large quantities of farming implements, teams, wagons and seed, and employing a man and his family at monthly wages for such reclamation, improvement and cultivation, upon the promise of the manager of said company that water would be furnished on and after April 15, 1907, because of which not being done, great loss was occasioned to said assignee.

Said agreement or stipulation of facts also waived notice of submission of evidence relative to said pending application for extension of time within which to make final proof and provided that the stipulated facts bearing on such application may be considered therein.

The local officers held that it was without their jurisdiction to pass upon or attempt to pass upon the merits of said application, and that upon the merits of the contest filed by said Hoobler they found that because reclamation of the land had not been accomplished within four years from date of entry, as provided in the law irrespective of said act of March 28, 1908, the entry should be canceled.

The Commissioner holds that said act of March 28, 1908, applies herein, under the facts stipulated and said application under that act, and that allowance of such application "disposes of the present contest, leaving the entry intact."

The appeal contends that said agreed statement of facts alone should govern this contest, and that said application has no bearing therein, and that the entry should be canceled because of the lack during the lifetime of the entry, of any irrigation, improvement, cultivation, or reclamation of the land or of any expenditure in good faith for "a valid water right."

The contestee moves to dismiss the appeal on the ground that the Secretary has no jurisdiction to review the act of the Commissioner in allowing said application.

It is well settled that the Secretary has supervisory power over the entire conduct of the land business of the Department. The motion to dismiss the appeal is accordingly denied.

The contention that this contest is superior to and precedes said application under the act of March 28, 1908, for an extension of time within which to make final proof under this entry cannot be sustained. The contest appears in fact to be ill advised, as it does not set forth facts which if proved would necessitate cancellation of the

entry. It charges only a failure to irrigate, reclaim and cultivate the land or to make any expenditure "in good faith for the purchase of valid water rights for the irrigation of the same." As four years had then expired and there was pending a duly corroborated affidavit showing *prima facie* a right to the benefit of the act of March 28, 1908, extending the time for making final proof in this class of cases, the contest affidavit should have alleged also facts tending to overcome such *prima facie* showing of a right under that act.

Said act provides, in section 3:

That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof, as required by said acts, of the completion of said works.

The benefit accorded by said act appears to be more than a mere privilege resting in the discretion of the Commissioner, to allow or to deny. The act itself specifically grants extension upon certain facts being shown to exist, and the discretion given therein to the Commissioner properly relates to the period and not to the act or fact of extension.

It satisfactorily appears that this entryman's assignee acted in good faith in undertaking to comply with the desert land law, expending a large amount of money in reliance upon a system of irrigation approved as and reputed to be adequate, and only failing because of reckless if not criminal mismanagement of the company by its principal officer. Until water was secured, cultivation of the land would be useless, and failure to cultivate under the circumstances shown is not evidence of bad faith nor such fault on the part of the assignee herein as should exempt him from the remedial operation of this act. The contention made that he did not make expenditure in good faith "for a valid water right" contains no force, as the failure to receive water under his purchase was not due to invalidity of his purchased right but to mismanagement of the company's affairs, rendering it unable to fulfill its contract to furnish water under such purchase.

The facts specified in said act as basing and entitling to extension thereunder are shown herein to the satisfaction of the Commissioner, as provided in the act, and his finding is fully warranted by the evidence. The assignee is entitled to extension accordingly, and the contest was thereby foreclosed and properly dismissed.

The decision appealed from is therefore affirmed.



## MILTON S. GUNN.

*Decided March 11, 1911.*

## INDIAN LANDS—SOLDIERS' ADDITIONAL LOCATIONS.

Lands in the former Gros Ventre, Piegan, Blood, Blackfeet and River Crow Indian reservation, opened under the act of May 1, 1888, "to the operation of the laws regulating homestead entry, except section 2301 of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain," are subject to appropriation under section 2306 of the Revised Statutes by location of soldiers' additional right.

## WITHDRAWAL ACT—COAL CLASSIFICATION ACT—SURFACE RIGHTS ACT.

The act of June 25, 1910, authorizing temporary withdrawals of public lands for certain purposes, does not repeal or render ineffective the act of June 22, 1910, providing for agricultural entries of coal lands, or the act of March 3, 1909, providing for protection of the rights and the issuance of restricted surface patents to entrymen of lands subsequently classified, claimed or reported as valuable for coal.

## COAL LAND WITHDRAWAL—SOLDIERS' ADDITIONAL APPLICATION.

A withdrawal for coal classification under the act of June 25, 1910, does not defeat a pending application to locate a soldiers' additional right or bar applicant's right under the act of March 3, 1909, to take a surface patent for the land.

PIERCE, *First Assistant Secretary*:

October 21, 1909, Milton S. Gunn, assignee of David O. Waid, filed in the Glasgow, Montana, land office, an application to enter under section 2306, R. S., the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 10, SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 12, T. 24, N., R. 50 E., M. M., containing 120 acres, based on the military service of David O. Waid during the Civil War and on his homestead entry made at Ft. Dodge, Iowa, August 29, 1866, for 40 acres.

The land applied for is a portion of an area opened to entry under the act of May 1, 1888 (25 Stat., 133), formerly in the Gros Ventre, Piegan, Blood, Blackfeet and River Crow Indian Reservation. Section 3 of said act reads as follows:

That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

By decision of January 25, 1911, the Commissioner of the General Land Office rejected the above application, from which decision an appeal brings the case before the Department for consideration.

It is stated in the said decision that the tracts applied for were withdrawn by the Secretary on April 10, 1910, from coal filing or entry. Also by Executive order of July 9, 1910, for coal classification under the act of June 25, 1910.

The rejection of the application was based upon the decision of the Department in the case of Thomas A. Cummings (39 L. D., 93), and the fact that the land was withdrawn as above stated. It was held in the said case of Cummings that an entry by an assignee of a soldier under section 2306 R. S. is not of that class subject to confirmation under the provisions of the act of March 3, 1891 (26 Stat., 1095). That decision will not affect the adjudication of this case as the construction of an entirely different act is here involved. It is observed that the act under which these lands were opened to entry declares that they "are open to the operation of the laws regulating homestead entry, except section 2301 of the Revised Statutes." No other feature or part of the laws regulating homestead entry was excepted from operation.

In some instances reservations have been opened under the homestead laws to actual settlers only. In such cases entries of this class have been denied. But it has always been the practice to permit entries of this class to be made for lands which are subject to homestead entry unless restrictions are imposed thereon incompatible with the nature of this class of entries. This practice could be generously illustrated by citation, but sufficient proof of same is found on page 46 of General Circular of January 25, 1904. With reference to Oklahoma lands, it is there stated:

The statutes provide for the disposal of these lands except the lands in what was known as the "Public Land Strip," now Beaver County, "to actual settlers under the homestead laws only," and while providing that "the rights of honorably discharged Union soldiers and sailors in the late civil war, as defined and described in sections 2304 and 2305 of the Revised Statutes (see page 131 of this circular), shall not be abridged," make no mention of sections 2306 and 2307 thereof, under which soldiers and sailors, their widows and orphan children are permitted, with regard to the public land generally, to make additional entries in certain cases, free from the requirement of actual settlement on the entered tract (see pp. 26 and 132 of this circular). It is therefore held that soldiers' or sailors' additional entries can not be made on these lands under said sections 2306 and 2307 unless the party claiming will, in addition to the proof required on pages 26 and 132 of this circular, make affidavit that the entry is made for actual settlement and cultivation, according to section 2291, as modified by sections 2304 and 2305 of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced before the issue of final certificate. This restriction, however, is not applicable to the lands in what was known as the "Public Land Strip," as said lands are subject to disposal under the general homestead laws (except sec. 2301, Rev. Stat.), including said sections 2306 and 2307, United States Revised Statutes.

It is represented that several thousands of acres of these lands have been applied for under sections 2306 and 2307, R. S., and many such applications are pending; that these soldiers' additional rights were purchased and located upon the faith of the practice of the land department and that it would result in great financial loss and destruction of property rights and the confiscation of improvements placed on some of the lands if the practice of the Department should be reversed and the applications denied. It appears that many entries of this class for these lands have already passed to patent.

Considering the said statute and the established practice, the Department sees no reason for denying the application upon the ground that the said act excludes entries of this class.

The further objection stated in the Commissioner's decision, namely, that the said withdrawal precludes allowance of this application, is also subject to modification.

The act of March 3, 1909 (35 Stat., 844), which was designed to protect the surface rights of entrymen, was interpreted by instructions of September 7, 1909 (38 L. D., 183), in part as follows:

The main purpose of the act is to protect persons, who, in good faith, have located, selected, or entered, under nonmineral laws, public lands which are, after such location, selection, or entry, classified, claimed, or reported as being valuable for coal by providing a means whereby such persons may, at their election, retain the lands located, selected, or entered, subject to the right of the Government to the coal therein. It applies alike to locations, selections, and entries made prior to its passage and those made subsequently thereto.

It is clear, therefore, that this claimant is entitled to protection under the terms of the above act to the extent of the right to take surface patent unless such right is defeated by the said withdrawal for coal classification. The said act of June 25, 1910 (36 Stat., 847), under which the withdrawal is made, contains the following proviso:

That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made.

It is assumed that the Commissioner considered this claim defeated by the said withdrawal because it is not an entry but only an application to enter. It is not believed, however, that this general act, giving to the President authority to make temporary withdrawal of lands for different purposes was intended to repeal or render ineffective other acts specifically permitting entries of certain classes entirely in harmony with the purpose of any such withdrawal. This view is strengthened by consideration of the act of June 22, 1910

(36 Stat., 583). The proviso to the first section of said act reads as follows:

*Provided*, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

If, as above shown, Congress did not permit the right to a surface patent under a nonmineral claim to be defeated by withdrawal or classification of the lands as coal lands where the claim was initiated *after* such withdrawal, it would appear to follow, and with greater reason, that it was not intended that the right to surface patent under such claims initiated *prior* to withdrawal should be defeated by such withdrawal. With reference to nonmineral claims for coal lands, the said acts of March 3, 1909, June 22 and June 25, 1910, should be considered together, as they have one main purpose in common, namely, the ultimate designation and classification of lands valuable for their coal deposits and the disposal of the title to the surface for agricultural purposes separate and apart from the coal deposits. The object aimed at was to effect reservation of the coal without at the same time tying up the surface from agricultural use. This claimant should be permitted to take title to the surface of the land applied for, or, under another provision of the act of March 3, 1909, he should be accorded a hearing in case he should elect not to take surface patent but instead should dispute the alleged coal character of the land and demand a hearing with the view of establishing his right to an unrestricted patent.

Attention is called to the recent act of Congress, Senate Bill 10761, approved March 3, 1911 (Public—No. 462), which amended section 3 of the aforesaid act of May 1, 1888, to read as follows:

That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of laws regulating the entry, sale, or disposal of the same: *Provided*, That no patent shall be denied to entries heretofore made in good faith under any of the laws regulating entry, sale, or disposal of public lands, if said entries are in other respects regular and the laws relating thereto have been complied with.

This act removes any possible objection which might have been made theretofore under the former act to the location of soldiers' additional rights as such upon lands within the said former reservation. The restrictions in the former act are merely removed by the latter act. Any withdrawal or reservation made since the extinguishment of the title of the Indians remains undisturbed by the latter act.

The decision appealed from is reversed and the case remanded for action as indicated herein.

## INSTRUCTIONS.

## FOND DU LAC INDIAN LANDS—RAILROAD RIGHT OF WAY.

No deduction in acreage or payments will be made in entries of Fond du Lac Indian lands traversed by the Northern Pacific Railroad Company's right of way because of the area embraced in such right of way.

*First Assistant Secretary Pierce to the Commissioner of the General Land Office, March 13, 1911.*

The Department has considered your office letter, addressed to the register and receiver at Duluth, Minnesota, and submitted for my approval, respecting the right of way of the Northern Pacific Railway Company across tribal lands in the Fond du Lac reservation.

It appears from the statement contained in your said letter that pursuant to instructions from the Commissioner of Indian Affairs, Mr. S. W. Campbell, superintendent at La Pointe Agency, in Wisconsin, convened a council of the Fond du Lac band of Chippewa Indians, on their reservation, November 8, 1900, who, after full discussion of the matter, unanimously agreed to accept the sum of \$10 per acre from the Northern Pacific Railway Company in full settlement for all damages accrued on account of the right of way of said company through the tribal and unallotted lands on the reservation in Minnesota; that under date of February 26, 1901, Mr. Campbell submitted a schedule of lands across which the right of way was extended, together with the area in each subdivision covered by the right of way and the amount which the company was to pay for the same, which schedule was approved by the Secretary of the Interior March 9, 1901, and in accordance with which the railroad company made settlement.

In the letter addressed to the register and receiver it is stated that as the railroad company has paid \$10 per acre for its right of way through the lands, and as the act of July 2, 1864 (13 Stat., 365), which granted the right of way, also provided for the extinguishment of the Indian title, which your letter states has been done, it was accordingly error to allow entries under the public land laws for such lands without eliminating the tract included in the right of way. The local office is accordingly instructed, in allowing further entries for any of said lands, to note on the original applications and final certificates, the following: " \* \* \* except, approximately, ——— acres covered by the right of way of the Northern Pacific Railway Company."

It is further held in your letter that the acreage covered by the right of way is to be deducted from the acreage described in the entry papers already issued and from the acreage for which the entrymen

will be required to pay, and, in certain cases where final certificates have already been issued, the local office is instructed to note on each of said certificates that there is excepted from the disposal of each of the tracts involved, the right of way of the railroad company for the acreage given, and each entryman is to be advised and informed of his right to make application for the return of the amount paid by him for the tract covered by the right of way.

The Department is not disposed to approve this letter. While the right of way granted the Northern Pacific Railway Company by the act of 1864 is a grant in fee, it is not a fee simple but is subject to reversion in the event that the company should cease to use the land for railroad purposes. It is not the rule of the Department to except from patents issued to entrymen under the public land laws the area embraced in the right of way across the lands entered; nor has it been the practice to relieve purchasers under the public land laws from paying for the full area of the tract purchased, notwithstanding that such purchase is made subject to the company's right of way.

To except from a patent the tract of land included in the right of way would be to reserve a narrow strip of land which, if abandoned by the railroad company, would revert to the government and would not inure to the benefit of the purchaser of the subdivisions traversed by such right of way.

It is believed that damages paid by the railway company in this case were merely damages resulting from the construction of the railroad across the reservation and in no sense represented a purchase of the land covered by the right of way. As above indicated, therefore, I must decline to approve the letter prepared by your office.

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EMMA S. PETERSON.

*Decided March 14, 1911.*

#### SOVEREIGNTY OF STATE OVER NAVIGABLE WATERS—ISLANDS.

Upon the admission of a State into the Union it acquires absolute property in and dominion and sovereignty over all soils under the navigable waters within its borders; but islands therein formed prior to admission of the State remain the property of the United States, subject to disposal as other public lands.

#### SURVEY AND DISPOSAL OF ISLAND OMITTED FROM SURVEY.

The United States has authority to survey and dispose of an island lying between the meander line and the thread of a stream, navigable or non-navigable, omitted from survey at the time the public land surveys were extended over the township, where it clearly appears that at the time of the township survey the island was a well-defined body of public land left unsurveyed.

PIERCE, *First Assistant Secretary*:

The application of Emma S. Peterson for the survey of an island in Snake River, a navigable stream, and in sections 15 and 22, T. 10 S., R. 24 E., B. M., Idaho, containing about 55 acres, has been submitted to the Department for consideration with recommendation by the Commissioner of the General Land Office that it be not allowed notwithstanding the proof now submitted shows that the island existed at and prior to the township survey in 1874 and before the admission of the State of Idaho into the Union in 1889, it appearing that all the lands on the opposite shores of the abutting mainland have been disposed of in accordance with the township plats of survey.

The views of the Commissioner appear to have been controlled by a decision of the Supreme Court of Idaho in the case of *Lattig v. Scott et al.* (107 Pac. Rep., 47-56), holding that—

the omission on the part of the Government to take notice of an existing island or tract of land between a meander line and the stream it purports to meander, and the subsequent approval of the (township) survey is to be taken as evidence that the island or strip of land beyond the meander line was intended to pass as part of and incident to the land it abuts.

The decision of the State court is not sustained by the rulings of the Supreme Court of the United States as to the authority of the general Government to survey a body of land omitted from survey at the time the public land surveys were extended over the township and will not be accepted as controlling its authority over the survey of any island in a navigable or nonnavigable stream where it clearly appears that at the time of the township survey the island was a well defined body of public land left unsurveyed.

The ruling of the court in the case cited purports to rest upon the well established principle that the grants of the Government for lands bounded by streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the laws of the State in which the lands lie, and that in the State of Idaho a riparian proprietor on a fresh-water stream, whether navigable or non-navigable, takes title to the thread of the stream.

That rule has been so firmly established by numerous decisions of the Supreme Court as to place it beyond the realm of controversy. But it can not so operate as to divest the United States of its right to sell definite bodies of public land lying between the meander line and the thread of the stream merely because it had been left unsurveyed at the time the public surveys were extended over the township and had not been expressly reserved.

A State upon its admission into the Union acquires absolute property in and dominion and sovereignty over all soils under the navi-

gable waters within its limits, with the consequent right to dispose of the title to any part of said soils in such manner as it may deem proper, subject to the paramount right of navigation over the waters in so far as such navigation may be required for the necessities of commerce with foreign nations and among the several States, the regulation of which is vested in the general government. (*United States v. Mission Rock Co.*, 189 U. S., 391.)

Prior to the admission of a State into the Union title and dominion over the beds of navigable streams within its borders remained in the United States. The United States may grant for appropriate purposes titles or rights in the soil below high water mark of navigable waters in any territory of the United States, but they have never done so by general law. The administration and disposition of the sovereign right in navigable waters and in the soil under them is left to the control of the several States when organized and admitted into the Union. (*Shively v. Bowlby*, 152 U. S., 1, 48-58.) Hence grants by the United States, under the public land laws, of lands bordering on or bounded by navigable waters within any territory do not convey of their own force any title or right below high water mark (*Ibid.*).

Whatever right or title the riparian proprietor may thereafter acquire to the bed of the stream must depend upon the local law. "If they (the States) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (*Barney v. Keokuk*, 94 U. S., 324, 338.) But the State can not resign to the riparian proprietor any greater right than it acquires as a sovereign, which is to the *soils under the water* and not to lands above. (*United States v. Mission Rock Co.*, 189 U. S., 391.)

It must follow as a necessary consequence that islands formed in a stream before the admission of a State into the Union are subject to disposal by the Federal Government as other public lands. (1 *Farnham on Waters*, 50; *St. Louis v. Rutz*, 138 U. S., 226, 247.)

In applying the well established rule that in all States where the common law rule prevails a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof, the court in the case cited assumed that the island in controversy was part of the bed of the stream that passed by the grant of the abutting uplands merely from the fact that it was omitted from survey at the time the public land surveys were extended over the township.

In *Grand Rapids and Indiana R. R. Co. v. Butler* (159 U. S., 87) the Court held that a small island so insignificant as to induce a government surveyor to decline to survey it as public land because of its insufficient value passed by a former grant of the abutting



mainland. In that case the State Supreme Court whose decision was under review held that when the Government has surveyed its lands along the bank of a river and has sold and conveyed such lands by government subdivisions, its patent conveys the title to all islands lying between the meander and the middle thread of the river, unless previous to the patent it has surveyed such islands as government subdivisions or expressly reserved them when not surveyed. The Supreme Court of the United States affirmed the judgments of the Supreme Court of Michigan so far as it held that whatever there was of such "conformation" passed under the grant to the patentees of the abutting mainland, but evidently for the reason that the island in question was so insignificant in area as to naturally induce government surveyors "to decline to survey this particular *strip* as an island," and it was therefore considered as part of the bed of the stream.

There is nothing in the decision indicating that the court approved or gave its sanction to the broad rule announced by the Supreme Court of Michigan that the grant of the bed of a stream carries with it a grant to all islands therein, because it expressly calls attention to the case of *Horne v. Smith*, decided at the same term (159 U. S., 40), as instructive in connection with the questions arising therein and holding that although a tract was unsurveyed "it does not follow that a patent for the surveyed tract adjoining carries with it the land which perhaps ought to have been, but which in fact was not surveyed," and cited approvingly the case of *Lammers v. Nissen* (4 Neb. Rep., 245), in which it was held that a body of land that had not been surveyed did not pass by a patent for a lot which on the government plat extended to the meander line.

In *United States v. Chandler-Dunbar Co.* (209 U. S., 447-449) the title to two small islands in the Sault Ste. Marie was involved. The court, after referring to the provisions in the act admitting the State of Michigan into the Union, that the State of Michigan will not interfere with the sale by the United States of vacant, unsold lands within the limits of said State, said:

These islands are little more than rocks rising very slightly above the level of the water, and contain respectively a small fraction of an acre, and a little more than an acre. They were unsurveyed and of no apparent value. We can not think that these provisions excepted such islands from the admitted transfer to the State of the bed of the streams surrounding them.

In *Whitaker v. McBride* (197 U. S., 510) the land department had refused to survey the island in question as public land. The court, after stating the rule that grants for lands bordering on streams and other waters, without reservation or restriction of terms, are to be construed as to their effect according to the laws of the State in which the lands lie and that in the State of Nebraska the riparian

proprietor owns the beds of the stream to the center of the channel, said that "nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island or of the rights which would result in case it did make such survey." And added—

that the Government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or preemption entry.

Here was a direct holding that the power to survey islands lying between the meander line and the center of a stream, existing at the date of survey and the admission of a State into the Union and left unsurveyed, remains with the general Government, which may or may not exercise its pleasure with reference to the survey of said lands, and that no one can complain of it.

That ruling is in harmony with the rulings of the Court in *Horne v. Smith*, *supra*; *Niles v. Cedar Point Club* (175 U. S., 300); *French-Glenn Live Stock Co. v. Springer* (185 U. S., 47); *Kirwan v. Murphy* (189 U. S., 35).

The decision of the Supreme Court of Idaho is predicated upon the theory that an island beyond the meander line becomes part of the bed of the stream, in common with the soil underneath, by the failure of the Government to survey it or expressly reserve it at the time of the township survey, and that the subsequent grant of the abutting mainland therefore passes title to the island as incident to and part of the land it abuts unless—

the body of land is so large and so situated that no other reasonable inference can be drawn but that it was not the purpose and intention of the surveyor to survey the entire tract or of the Government to part with title to the entire tract, and that the physical conditions and surroundings as facts are so clear and patent that the purchaser could not help but know that he was not purchasing so large a body of land nor buying a small fractional subdivision adjoining the unsurveyed tract.

In that view the court concludes that "it is only where the physical facts and circumstances rebut the legal presumption that the Government intended to part with title to the land in question that the court will recognize a further conveyance."

The court, in *Grand Rapids and Indiana R. R. Co. v. Butler* and in *United States v. Chandler-Dunbar Co.*, applied the rule conversely and held that where the islands are so insignificant in area as to be of no apparent value, mere "rocks rising very slightly above the level of the water," the presumption arises that the surveyor declined to survey the "particular strip as an island," and hence they were not excepted from "the admitted transfer to the State of the *bed of*

*the stream* surrounding them." No expression occurs in either case that sanctions, or intended to sanction, the ruling announced by the court in *Lattig v. Scott*, or to hold that any estate passed to the riparian proprietor by virtue of his grant from the Government other than the bed of the stream.

The island in question is said to contain 55 acres, 15 acres more than an ordinary legal subdivision, and of sufficient area to rebut any presumption that it passed to the State upon its admission into the Union as part of the bed of the stream.

The material question is whether the island was a well defined body of land existing at the date of the township survey and of the admission of the State into the Union. Where an approved township survey purports to show that all public lands within the limits of such township have been surveyed, it raises a strong presumption that no public lands were omitted from survey and no additional surveys should thereafter be allowed, except upon clear and convincing proofs of the existence of the lands at the date of the township survey and of the admission of the State into the Union. That was the rule announced in *George S. Whitaker* (32 L. D., 329) and *Robert L. Sheppard* (*ibid.*, 474), and it should be strictly followed in passing upon applications for survey.

The proof in this case shows that the island was in existence in 1874, at the time of the township survey, in its present form and position and, at that time, had every indication of having been long in existence; that it was heavily overgrown with willows and alders and infested by wild-cat, deer and other game. The decision of the Commissioner is reversed and the application will be allowed.

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G. W. GOEBEL.

*Decided March 15, 1911.*

RECLAMATION BUILDING CHARGES—TRUCKEE-CARSON PROJECT—FIRST INSTALLMENT.

The first instalment of building charges against lands held in private ownership within the Truckee-Carson reclamation project was due and payable December 1, 1907, notwithstanding application for water-right was not filed until after the close of the irrigation season of that year.

PIERCE, *First Assistant Secretary*:

March 30, 1908, the local officers issued certificate of filing of water-right application number 01098 (erroneously given number 01099) to George W. Hulen for 120 acres of irrigable land in private ownership lying in the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 20. and S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 21, T. 18 N., R. 29 E., M. D. M., Carson City, Nevada, land district. 21 acres of the area covered by this certificate were included in a con-

tract for a vested water-right entered into December 31, 1907, between Hulen *et al.* and the United States, and therefore the collection of charges in connection with said certificate is based on the additional area of 99 acres.

April 12, 1910, G. W. Goebel filed in the local office water-right application 04927, involving the same lands as certificate 01098, as assignee of Hulen. April 12, 1910, this application was suspended for the reason that it was not accompanied "by unpaid installment due December 1, 1909, for building charges." From this action of the local officers Goebel appealed, and by the decision of the Commissioner of the General Land Office of October 7, 1910, the action of the local officers was affirmed on other grounds than given by the local officers, and applicant has appealed to the Department.

The action adverse to applicant, from which this appeal is taken, is based upon a finding that the building installments of 1908 and 1909 were due and unpaid at the time of the attempted assignment to the appellant, and therefore Hulen's water-right was not properly assignable under the rules and regulations adopted in pursuance of the act of June 17, 1902 (32 Stat., 388). It appears that one installment of building charges, \$217.80, was paid December 8, 1909, but credited to the year 1907, and appellant contends against such application of the money for the reason that no water was furnished by the Government in that year, and because the application of Hulen was filed December 31, 1907, after the irrigation season was closed for that year, citing the case of *ex parte* Edwin P. Osgood (38 L. D., 374). That case, however, did not have application to lands in private ownership, and it is thought that the first installment of building charges in this case must be held to have fallen due December, 1907, and that the application of this payment to that year is correct.

Upon this appeal it is further contended that because of departmental order of November 27, 1909, directing that no steps to enforce a forfeiture for failure in regard to payments falling due December 1, 1909, should be taken until after March 31, 1910, and the assignment from Hulen to Goebel was made nearly four months previous to that date, to-wit, December 18, 1909, Hulen's application was not subject to cancellation when such assignment was made and the rights of applicant should be adjudicated upon that basis. By the order of November 27, 1909, Hulen, as well as other water right applicants, was in effect granted a stay of proceedings and allowed until March 31, 1910, to make the payments due December 1. It is believed that his assignee, Goebel, should also be accorded the benefit of said order.

Appellant further states that the receipt which was issued for the payment in December, 1909, "states that said payment is made for

1908, and in accordance with the rulings of the Department, no money can be received for any year when a previous charge is unpaid." This contention cannot be sustained.

The decision appealed from is found correct, except in the holding that the water-right certificate of Hulen was not properly assignable when assigned because two installments of building charges were unpaid on that date. The decision appealed from is modified and the case is remanded to the General Land Office for further proceedings in accordance with the views herein expressed.

### INSTRUCTIONS.

#### PRACTICE—TIMBER AND STONE SWORN STATEMENT—RETURN OF FEES.

The fee required to be paid at the time of the presentation of a timber and stone sworn statement should be returned to the applicant in all cases where for any reason other than fraud the local officers reject such sworn statement at the time of its presentation or at any time prior to the submission of proof in pursuance of the published notice.

*Acting Secretary Pierce to the Commissioner of the General Land Office, March 17, 1911.*

In the case of Eliza Denton (not reported) the Department, by decision of March 15, 1911, reversed the decision of your office rendered November 28, 1910, and directed repayment to the applicant of the \$10 fee paid in connection with her timber and stone sworn statement, Duluth 07608, under the provisions of the act of March 26, 1908 (35 Stat., 48), on the ground that said payment was in excess of the amount required of such applicant. It is noted that the action of your office in rejecting said application was based on the ground that:

The fee is payable, under the timber and stone act for "filing and acting" on the application, and it is earned whether the application is allowed or rejected.

In this connection, the Department is of the opinion that, while the present regulations require that such fee be paid at the time the sworn statement is filed, it is not earned until the local officers have acted on the application for patent (the proof required by the act of June 3, 1878, 20 Stat., 89). It is therefore directed that in all cases where for any reason other than fraud the local officers reject such a sworn statement, the accompanying fee should thereupon be returned to the applicant. Such fee will be considered as earned only when the local officers have acted upon the proof submitted in pursuance of the published notice, whether the same be then allowed or rejected. See circular of May 16, 1907 (35 L. D., 568).

WOODMAN *v.* MCGILVARY.

*Decided March 17, 1911.*

## MINING CLAIM—PROTESTANT—PRACTICE—APPEAL.

A relocation of a mining claim subsequent to the allowance of entry does not constitute an intervening adverse right, and upon rejection of a protest by the relocater against the entry he is not entitled as a matter of right to appeal from such action, being a protestant without interest.

## FINAL CERTIFICATE AND PATENT—DEATH OF APPLICANT.

As a general rule final certificate and patent for a mining claim should issue to the applicant in whose name the patent proceedings were initiated and prosecuted; and in event of his death certificate and patent should nevertheless issue in his name, and not to his heirs.

## PATENT PROCEEDINGS—DILIGENCE.

While an applicant for patent for a mining claim must diligently prosecute the patent proceedings to completion, yet where the local officers, upon a showing deemed by them sufficient, have in fact allowed entry, although not within the calendar year in which the publication of notice of the application was completed, and there is no intervening adverse claim, the entry should not be canceled upon the protest of one alleging relocation of the land subsequent to allowance of the entry.

## CONFLICTING DECISION DISTINGUISHED.

Decision in Copper Bullion and Morning Star Lode Mining Claims, 35 L. D., 27, distinguished in so far as it applies to *ex parte* cases.

PIERCE, *First Assistant Secretary:*

March 28, 1906, Alexander N. McGilvary filed an application for patent, at Sacramento, California, for the Oro Vista placer, embracing the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. 17, T. 19 N., R. 4 E., M. D. M., the application being sworn to February 6, 1906. It appears that notice was published in his name, but an error was made in the description of the land. A copy of this notice, however, does not accompany the record. A new publication was made, in the name of Clara A. McGilvary, widow of the applicant, who died April 12, 1906, May 30, 1907, to August 1, 1907. The application to purchase was filed November 11, 1908, by the widow, claiming under section 1469 of the California Code of Civil Procedure, a provision relating to proceedings in the Probate Court to adjudge the estate of a deceased person to his widow for her support. November 14, 1908, the register and receiver allowed the mineral entry No. 0718, in the name of "Clara A. McGilvary, widow of Alexander N. McGilvary, now deceased," it being stated that the delay in applying to purchase was due to the error in the first published notice, and to the fact that the preparation of the final papers was delayed by the absence of the claimant's attorney. March 12, 1909, the Commissioner advised the widow that she must furnish a duly authenticated copy of the probate proceedings adjudging the estate to her under the above provision, in default of which the final certificate would be changed to read

to the "heirs of Alexander N. McGilvary, deceased," and patent issued accordingly. No such probate proceedings had been had, and the Commissioner has amended the final certificate to read as above.

May 20, 1909, Harley C. Woodman filed a protest against the entry, alleging that the annual assessment work for the years 1907 and 1908 had not been performed, and also that the necessary five hundred dollars had not been expended in labor and improvements upon the claim. A special agent of the Land Office and the register made a personal examination of the land, and reported that an excess of the statutory amount had been properly expended. This protest was dismissed by the Commissioner August 31, 1909. Woodman claimed to have relocated the ground February 27, 1909.

A new protest was filed by Woodman March 12, 1910, on the following grounds:

1. That the application was not made by the proper party.
2. That the claimant was guilty of laches in making entry.
3. That the second publication and posting of notice was not preceded by the filing of a new application for patent.
4. That the statutory \$500 in labor and improvements upon the claim had not been expended.

In support of the first allegation, a certified copy of a deed, executed March 14, 1906, by Alexander N. McGilvary, conveying the tract in controversy to his wife, Clara A. McGilvary, the deed being recorded April 10, 1906, was filed. In support of the last allegation several affidavits are presented. The Commissioner dismissed this protest May 26, 1910, and, upon motion for review, adhered to his action by his decision of July 28, 1910, from which the protestant has appealed.

At the outset it should be pointed out that Woodman's attempt at relocation, since it was made after the allowance of the McGilvary entry, is not an intervening adverse right (Marburg Lode Mining Claim, 30 L. D., 202), and that he is, therefore, a protestant without interest. As such he is not entitled to an appeal as a matter of right.

In reference to the first charge, it is apparent that upon the face of the papers as presented to the register and receiver, the application for patent was made by the holder of the record title. The protestant contends that the deed conveying the property to the applicant's wife having been executed before, although not recorded until after, the application for patent, the entire patent proceedings are void. The Commissioner held that the land department would not take cognizance of a transfer made subsequent to the date of the application for patent, citing paragraph 71 of the Mining Regulations. The protestant contends that under section 1055 of the Civil Code of California, the deed is presumed to have been delivered upon

the date of its execution, and that therefore the transfer antedated the application for patent.

It can not be doubted that publication of notice and entry would have been refused if this deed had been called to the attention of the register and receiver, and that the entry was irregularly made upon the application of one who was in fact not the owner of the claim, if the deed was actually delivered at the date of its execution, the presumption created by section 1055 of the California Civil Code being rebuttable. (Kerr's Civil Code of California, 1905; page 859, and cases there cited.) It should be noted that the deed was executed by McGilvary after he had sworn to his application for patent, which he no doubt thought had already been filed in the Land Office. Conceding, however, that the entry was irregularly made, should it now be canceled at the request of one who is seeking to take advantage of the technical defect upon an attempted relocation after the entry was allowed?

In the cases of John C. Teller (26 L. D., 484) and E. J. Ritter *et al.* (37 L. D., 715), the applicants for patent were not invested with the full title at the time of entry, there being outstanding interests which were later acquired. The Department held that although the entries were irregularly allowed, still, the title having been perfected, it would permit them to remain intact. In the present case, the title acquired will inure, under section 2448 of the Revised Statutes, to the widow, if she is the transferee, and the Department likewise sees no objection to permitting the entry to stand. The final certificate and patent, however, should be issued to Alexander N. McGilvary, the original applicant in whose name the proceedings were initiated and prosecuted.

In support of the second contention, the protestant cites the case of the Copper Bullion and Morning Star Lode Mining Claims (35 L. D., 27), which substantially held that where no obstacle or barrier prevented the completion of the patent proceedings within the calendar year in which the publication of notice of application for patent was completed, and no reason other than neglect or lack of attention was urged as an excuse for the delay, an entry made after the expiration of such year must be canceled. The application was filed November 5, 1901. Publication commenced November 9, 1901, and the entry was allowed May 24, 1904. A relocation of the Copper Bullion claim was made March 14, 1904, by one Bierl, who filed a protest against the entry. Upon appeal by the claimant to the Department, the protest was withdrawn, which left the matter a purely *ex parte* proceeding. It is well settled that the applicant for patent must diligently proceed to complete his patent proceedings, and that a failure to do so constitutes a waiver of all rights thereunder, and



will lead to a refusal to permit entry to be made; but when the local officers, upon a showing deemed sufficient by them, have allowed the entry, although not made within the calendar year, and there is no intervening adverse claim, the Department is of the opinion that the entry should not be canceled. In all the decisions cited in support of the ruling in the Copper Bullion case, the facts show that a relocation of the ground had been made before the allowance of entry, and the protest, on that account, filed. The cancellation of the entry in such cases is imperative, in order to protect the intervening locator's rights, which could not have come into being except for the laches and delay of the applicant for patent. It is thus apparent that the rule announced in the Copper Bullion case goes beyond the authorities cited in its support, and will no longer be followed by the Department in *ex parte* cases.

The third allegation is without merit, and the Department, in view of the favorable reports of the special agent and register, concurs with the Commissioner in refusing to order a hearing upon the fourth.

The decision of the Commissioner dismissing the protest is accordingly affirmed, the final certificate and patent to be issued in the name of Alexander N. McGilvary.

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GRENON *v.* MILLER.

*Decided March 18, 1911.*

**TIMBER LAND—TIMBER SUITABLE FOR MINING PURPOSES.**

Land upon which there is a growth of timber useful for mining purposes and so located with reference to mines as to give it a value for such purposes greater than its value for agricultural purposes is timber land within the meaning of the act of June 3, 1878, and subject to entry under that act.

**PIERCE, *First Assistant Secretary:***

Appeal is filed by Nora Miller from decision of October 24, 1910, of the Commissioner of the General Land Office reversing that of the local officers and rejecting the timber and stone statement filed by said Miller September 10, 1908, for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 28, T. 60 N., R. 21 W., 4th P. M., Duluth, Minnesota, land district, upon the protest against same filed May 25, 1909, by Sam A. Grenon, alleging that the land is chiefly valuable for agriculture and not for timber, as claimed by Miller.

Said Grenon also filed with his said protest an application to make homestead entry for this land.

On May 13, 1909, Maggie Dunlap also filed application to make homestead entry for said land, and on May 27, 1909, a protest similar to Grenon's against said timber and stone sworn statement.

On the same day of filing of said statement notice issued for making final proof thereunder on July 22, 1909, on which date such proof was made accordingly, both Grenon and Dunlap appearing, and the former being allowed to cross examine the proof witnesses the following day, to which continuance had been had, and Dunlap's motion for leave to also cross examine said witnesses being denied.

Hearing on Grenon's protest proceeded, Dunlap's motion to intervene being denied, and both Grenon and Miller presented testimony.

The local officers recommended dismissal of Grenon's protest and rejection of his application to make homestead entry, and that hearing on Dunlap's protest be ordered. On appeals by each party in interest, the Commissioner held that Miller, having the burden of proof as to the character of the land, had failed to show it is chiefly valuable for timber, as claimed, and rejected her said sworn statement accordingly, and directed disposition of said homestead applications in their order of filing.

The testimony herein is conflicting in some respects. It is undisputed, however, that the west one of the four forty-acre tracts involved is entirely timbered and contains no land now available for farming. The only land now available for farming at little expense for clearing consists of 45 or 50 acres through which a small river winds from the northeast corner of the forty-acre tract next east of the one above mentioned and through the northern portions of the remaining tracts, about 10 acres or less lying in the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , the second tract mentioned, 20 acres or more in the tract next east, and 16 acres or less in the fourth tract. This river land is meadow, growing a good quality and quantity of wild grass, one ton or over an acre, valued at \$1 a ton; but it is subject in wet seasons to overflow of the river, rendering harvesting the grass practically impossible at such times.

The testimony as to the character of the soil is conflicting, but the preponderance thereof shows it is sandy, of doubtful agricultural value. Most of the lands adjoining or in that locality are taken as timber lands, and the cutover lands are little used for agriculture. Small gardens, only, appear to have been raised.

The testimony as to the amount and merchantability of the timber on this land is also conflicting. There appears to be a quantity of trees ranging up to two feet in diameter, generally small, with a thick undergrowth on all except the meadow land. A cruiser experienced in timber for mining purposes, testifying on behalf of the timber and stone applicant, states that there is on this land a large quantity of timber which is "very valuable" for such purposes and useful in mines located 15 to 30 miles away. He made apparently a careful cruise to determine the amount of valuable timber on this land in each forty-acre tract. Most of the timber is jack pine, as admitted by

both parties, with spruce, poplar and a small quantity of Norway and white pine, and considerable birch, tamarack and other kinds not considered of merchantable value. According to said cruiser, the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of said section has about \$1180 of valuable timber thereon; the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , has about \$310, the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  has about \$350, and the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , has about \$325.

Other testimony estimates the quantity of merchantable timber at much less than this cruiser, but the prices per thousand feet given by him are not controverted, and at such prices the quantity of merchantable timber on said SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  tract is valued at \$246 and that on said SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  tract at \$71 for jack and Norway pine, besides 30 cords of spruce pine, a kind which said cruiser values at \$3 a thousand feet. The remaining forty-acre tracts contain, according to such other testimony, only 8 or 10 thousand feet, each, of merchantable timber, of little value.

The trees on this land are generally small, as stated, and are of a kind principally useful for lagging and other mining purposes, according to said cruiser, and are so located with reference to mines as to be valuable, as testified to by him. Access to market appears to be possible, though difficult, by means either of wagon road or of said river.

The Commissioner holds that—

Generally speaking, it may be said that trees of the character above described are not of the class contemplated by the act of June 3, 1878 (20 Stat., 89), and the acts amendatory thereof. That is, it is not merchantable timber, or such timber as is ordinarily used in the manufacture of lumber for building and construction purposes, and as such lumber becomes an article of commerce. However, while such timber is not merchantable in character in a general sense, it may be, or become, merchantable in fact by reason of a demand therefor in the vicinity in which it is located for some special construction purpose. But in such case the burden is on the timber and stone applicant to show not only that there is such a demand but that the timber is accessible to the market and can be handled and disposed of at a remunerative price.

Such showing has not been made in this case, and this office is of opinion that the land in controversy is of little or no value on account of its timber, and that while it may not be the best of agricultural land, it may be utilized for that purpose with some degree of success.

The Department cannot concur in this conclusion. The testimony satisfactorily shows, by a preponderance thereof, that the timber on this land is of a kind which is useful for mining purposes and is so located with reference to mines as to give it a value for such purposes, and on at least the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of said section its value for such purposes is in excess of the present value for agricultural purposes of that portion of the land involved herein. Such portion of said land is timber land within the meaning of the law.

The matter of marketing the timber does not appear to be a material factor in determining the timber character of land. That mat-

ter was doubtless considered to an extent by the cruiser mentioned herein in valuing this timber, but the determining factor is the usefulness of the land, whether for the building timber thereon or for agriculture, in its present state. The land must be, in its present state, because of its timber growth "substantially unfit for cultivation" (*United States v. Budd*, 144 U. S., 154, 167).

Said S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  in this case is substantially unfit for cultivation except only as to ten acres, or less, of meadow land, and its chief and only present value, with that exception, is because of the timber thereon.

The decision appealed from is therefore modified, and Miller's sworn statement may be allowed and proof accepted as to said S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of said section, and the applications of Grenon and Dunlap be disposed of in their order of filing as to said S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of said section.

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#### FLEMING McLEAN.

*Decided March 20, 1911.*

#### TRUCKEE-CARSON PROJECT—WATER-RIGHTS.

The regulations of November 1, 1907, with respect to water-rights in the Truckee-Carson reclamation project, did not take effect until January 1, 1908, and a water-right application filed in the meantime is subject to the regulations of May 6, 1907.

#### WATER-RIGHT CERTIFICATE—STATUS OF PURCHASER FROM ORIGINAL OWNER.

Upon the issuance of a water-right certificate the right evidenced thereby becomes appurtenant to the land, subject to forfeiture for failure to pay the annual instalments at the time and in the manner prescribed by law and the regulations, and a subsequent purchaser of the land succeeds to the rights and status of the original owner, subject to the same charges and conditions.

#### PIERCE, *First Assistant Secretary*:

Fleming McLean and Thomas Dolf filed their separate appeals from a decision of the General Land Office, holding for cancellation certificate of a water-right issued to said McLean, for the irrigation of 80 acres of land held in private ownership, and lying in the Truckee-Carson Irrigation Project, for nonpayment of installments for building charges for the years 1907 and 1908, and for the nonpayment of operating and maintenance charges for the year 1908; also, holding for cancellation a certificate of water-right, issued to Thomas Dolf, for 13 acres of the aforesaid land, which he acquired as assignee of McLean, and requiring the said Dolf to amend his application by agreeing to pay at the rate of \$30 per acre for a water-right for the said 13 acres, as required by circular of November 1, 1907, and to pay the installment of water-right charges for 1909.

The circular of November 1, 1907, to which reference is made, provides that all applications for water-right made on or after January 1, 1908, under the Truckee-Carson Project, shall be subject to a building charge of \$30 per acre, and must be accompanied by the first installment of the charges.

Appellant McLean, who was the owner of the entire N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 32, T. 19 N., R. 29 E., lying under said project, and containing 80 acres of land, filed application for a water-right for the irrigation of said land, to be appurtenant thereto, agreeing to pay the sum of \$22 per acre as building charges and the maintenance and operation charges that may be assessed against said land on account of said water-right. The certificate was issued December 31, 1907, as applied for.

March 16, 1908, he conveyed to appellant Dolf, by deed, 13 acres of said land lying north of the channel of New River, and on November 22, 1909, Dolf applied for water-right for the irrigation of said 13 acres, asking that credit be given for all payments theretofore made by the prior owner under his application, and, subject to such credit, he agreed to pay for said water-right the sum of \$22 per acre, in annual installments as fixed by the Secretary of the Interior, and the maintenance and operating charges duly assessed against said land on account of said water-right.

The appeal of McLean alleges, substantially, that it was error to hold that he was delinquent for nonpayment of any charges, under the circular of November 1, 1907, and that it was error to hold that his certificate was subject to cancellation at the time of the assignment of the 13 acres to Dolf, and was nonassignable. Appellant Dolf alleges, in addition, that it was error to require him to pay at the rate of \$30 for a water-right for the said 13 acres, instead of the \$22 rate required by the regulation at the time of McLean's application.

The circular of November 1, 1907, was intended to take effect January 1, 1908, and is not applicable to water-right applications made prior to that date. McLean's application is controlled by the circular of May 6, 1907, which provides that—

The first instalment of said charges for all irrigable areas shown on these plats, whether or not water-right application is made therefor, or water is used thereon, shall be due and payable on or before December 1, 1907, at the local land office at Carson City, Nevada, the total payment for 1907 being not less than \$2.60 per acre. The building charge for subsequent years shall be due and payable at the same place on or before December 1, and the operation and maintenance charge shall become due as announced by the Secretary of the Interior each year.

He was therefore chargeable with the installment that became due December 1, 1907.

The application for a water-right for lands in private ownership is a contract between the owner of the land and the United States, by which it is mutually agreed that the right to use such water shall be appurtenant to the land described in the application, and said owner agrees to pay for such water-right the estimated cost of construction of the works, in such annual installments as may be fixed by the Secretary of the Interior, and to pay the annual assessments for maintenance and operating charges, and upon failure to comply with the terms of the reclamation act and the *regulations* thereunder, the "application shall be subject to cancellation by the Secretary of the Interior with the forfeiture of all rights acquired thereunder and all payments made thereon." The obligation incurred under such contract may, in the event of default of payment, be enforced by judgment as to all installments due, and a forfeiture of the water-right may also be declared, if it shall be the pleasure of the Government to do so.

By the fifth section of the reclamation act entrymen of public lands are protected from forfeiture for failure to make payments due, for a period of one year from the time a payment becomes due, under the provision that "a failure to make any two payments when due shall render the entry subject to cancellation with a forfeiture of all rights under this act, as well as of any money already paid thereon."

This provision has been applied, by regulation, to all who receive water under any project, whether as entrymen, or as the owners of land. (Regulations, 37 L. D., 468. See, also, 38 L. D., 620.)

By order of November 27, 1909, it was directed that in all projects where the water-right payments became due on December 1, 1909, "no steps will be taken to enforce forfeiture for failure to make payments due until after March 31, 1910."

October 6, 1910, the Commissioner of the General Land Office was instructed to prepare, and submit to the Department, an order, providing that "as to water-right payments which become due upon reclamation projects December first next no steps will be taken to enforce forfeiture for failure to make payments until after March 31, 1911."

The object of those orders was to suspend all action looking to the forfeiture of the water-right for the time stated therein, both as to payments due and payments that had become delinquent.

McLean will therefore be required to pay, on or before March 31, 1911, the annual installments due for the years 1907, 1908 and 1909, upon the 67 acres of which he is still the owner, and notice should be given him to that effect.

The water-right evidenced by the certificate issued to McLean December 31, 1907, was for the entire 80 acres embraced in his

application, and it became appurtenant to said land upon the issuance of the certificate therefor, subject to forfeiture for failure to pay the annual installments at the time and in the manner prescribed by law and the regulations. Dolf, by his subsequent purchase of the 13 acres, succeeded to the rights and status theretofore obtained by McLean under his application of December, 1907, subject to the same charges and conditions, and is entitled to make payment of building charges at the rate of \$22 per acre.

The decision of the General Land Office is modified accordingly.

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NORTHERN PACIFIC RY. CO. v. STATE OF IDAHO ET AL.

*Decided March 20, 1911.*

STATE SELECTIONS—ACT OF AUGUST 18, 1894—EXCESS.

A selection for university purposes by the State of Idaho within the sixty-day preference right period accorded it by the act of August 18, 1894, in excess of the unsatisfied portion of its grant for such purpose, may be for that reason rejected in its entirety; and the State is not entitled to transfer the excess to the satisfaction of other grants, to the prejudice of the rights of settlers.

APPLICATION FOR SURVEY—NOTICE.

Where an application for survey by the State under the act of August 18, 1894, was addressed to the surveyor-general for the State and the Commissioner of the General Land Office and filed with the surveyor-general and by him transmitted to the Commissioner, the published notice of such application will not be held defective merely because publication thereof commenced prior to receipt of the application by the Commissioner.

NORTHERN PACIFIC SELECTIONS—STATE SELECTIONS.

Selections by the Northern Pacific Railway Company under the act of March 2, 1899, proffered subsequent to the application of the State for survey of the lands under the act of August 18, 1894, and while the lands were reserved from appropriation adverse to the State, are not, upon rejection of the subsequent application by the State, entitled to recognition as of the date of presentation, to the prejudice of the rights of settlers.

NORTHERN PACIFIC SELECTIONS—SETTLEMENT CLAIMS.

The railway company having filed supplemental lists of selections after the filing of the township plat and within the time allowed by law, adjusting its selections to the lines of survey, settlement claims initiated subsequent to the filing of such lists will be rejected, and entries inadvertently allowed subsequent to that date canceled; while entries allowed and settlement claims by qualified homesteaders initiated prior to that time will be accorded priority over the company's selections, if since maintained by compliance with law.

PIERCE, *First Assistant Secretary:*

By letters "F" of August 24, 1909, and October 29, 1909, your office submitted "request for instructions" as to the further administration of the laws governing the disposition of lands embraced in

applications by the State of Idaho for university purposes, under the act of July 3, 1890 (26 Stat., 215), per lists 3, 4, 5, 6, 7, 8, and 9, aggregating 4629.55 acres, in T. 44 N., R. 2 E., and T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho.

The request has been in suspension awaiting the final action of the Attorney-General of the United States upon certain questions affecting school indemnity selections by said State involved in the case of *Heirs of Irwin v. State of Idaho et al.*, decided by this Department September 23, 1909 (38 L. D., 219), which final opinion was rendered by that officer January 30, 1911 [39 L. D., 482], but the only question involved therein of importance, pertinent to the particular matter here under consideration, was the general one of asserted legal rights acquired by said State under its application for the survey of certain townships, in accordance with the provisions of the act of August 18, 1894 (28 Stat., 394); and inasmuch as the opinion is confined to the more narrow question involved in that case of the effect of a "filing" thereunder as against the right of the government to include lands so filed upon within a national forest, it is found of little value in the study of the many perplexing questions presented by this record.

The townships here in question have not been included within a national forest or other government reservation, and the matter is therefore free from that particular complication.

Certain departmental decisions of July 24, 1908, the particular one of which (D-577) is reported in (37 L. D., 68), in the case of *Northern Pacific Railway Company et al. v. State of Idaho*, considered the conflicting claims of the State, the railway company, and "numerous homestead claimants" to lands in said townships, and affirmed your office decisions of December 21, 1906, and March 16, 1907, sustaining the claim of the State as to lands embraced in the company's lists Nos. 133 and 135, proffered under the act of March 2, 1899 (30 Stat., 993). From said reported decision of July 24, 1908, it appears that the railway company's contention upon appeal went to the question of the right of the State to secure the benefits of the act of August 18, 1894, where the State's application for survey thereunder embraced an area largely in excess of the grant on account of which the application was made, and upon that particular question it was held that the State's right was not limited to an area sufficient to satisfy its grant, the reasons for such holding being stated at length and the case of *Thorpe et al. v. State of Idaho*, on review (36 L. D., 479), cited. A motion for review was filed on behalf of the railway company, it being contended that the State secured no preference right of selection by reason of its application for survey because of the fact alleged to be that the area embraced in this and other similar applications exceeded the unsatisfied portion of the



State's grant, and among other things it was urged in support of the motion that the Commissioner of the General Land Office had specifically refused to withdraw the lands upon the application of the State until the State could show that the withdrawal already made was not fully sufficient to satisfy its grant. Considering this contention and in denying the motion, the Department, in a decision of October 25, 1908, said:

A sufficient answer to this contention is that for the purposes of this case it is immaterial that the Commissioner of the General Land Office refused to "withdraw" these lands. By the terms of the act of August 18, 1894, *supra*, under which the application for survey was made, the withdrawal became effective and was an accomplished fact upon the perfection of the application, and while it remained for the Commissioner of the General Land Office to give notice of the withdrawal, the failure of that officer to do so did not defeat it. The withdrawal was statutory and in nowise depended on the discretion of the Commissioner of the General Land Office (*Thorpe et al v. State of Idaho*, 35 L. D., 640). This being true, and the lands being withdrawn for a special purpose, they were not subject to selection by the railway company, and this is true without regard to the question whether the State had previously apparently selected an excess of land to satisfy its grants.

Upon the promulgation of this decision the railway company, through its resident attorneys, requested that before the company's lists of selections were canceled an examination of the conditions of the grant to the State for university purposes be made, with a view of determining whether the grant had not or could not be fully satisfied from pending selections without regard to those embraced in this controversy. But your office, on November 7, 1908, considering said departmental decision of October 25, 1908, on review, as determinative of the company's claim to the land in question denied the request. A similar request was again denied by your office November 19, 1908, and on that day departmental decisions, on review, were promulgated and the company's selections directed to be canceled as to the lands in question.

Your office reports that on October 31, 1908, and on March 3, 1909, the Department directed that all action of your office looking to the final closing out of the conflicts between settlers and the State of Idaho involving lands in certain townships, be suspended until January 1, 1910, and that in the meantime on November 20, 1908, which was the day following the promulgation of said departmental decision on review, upon verbal request of the company's attorneys, the local officers were instructed by telegram to suspend action, until further orders, on the instructions canceling the company's selections here in conflict. It appears that at a date not stated the company again renewed its request, contending that the State's grant had been fully satisfied so that the pending applications to select could not, under any condition, be allowed but must be re-

jected, and that there being no preference right of selection left in the State the original selection by the company should be allowed to stand as of the original date.

Your office letter of August 24, 1909, recited the history of the litigation, made a statement of the condition of the company's grant for university purposes, and requested instructions "as to whether or not the pending application of the State . . . . should be rejected as excess selections, the company's selections of the land be allowed to remain intact, and the applications of the homestead claimants, based on settlements made after the original selections by the company, be rejected."

Under date of September 7, 1909, the matter was referred back to your office with instructions for more detailed statement and further recommendation.

It appears from your said letter of October 29, 1909, responsive to this reference, that approved selections made by the State on behalf of its grant for university purposes, totals the aggregate of the State's grant for such purposes, except 561.77 acres, and that the State had pending selections on account of such grant, not approved but exclusive of the selections here in question, for 520 acres. It also appears from a tabulated statement accompanying said communication that the total amount of lands at that time due the State on account of all of the quantity grants made to it by the act of July 3, 1890, is 6373.41 acres. Of this amount there were selections other than these here involved amounting to 3679.89 acres pending, leaving to be selected 2693.52 acres. So it appears that the aggregate of the pending applications to select for university purposes alone is far in excess of the area required to satisfy all of these grants.

Your said office report concludes as follows:

Under the circumstances, and as there are numerous adverse claims to the lands covered by the pending applications to select, I am of the opinion that the State is not entitled to transfer the application to select to any of the other grants. Therefore, I recommend that the *applications* under consideration be rejected as excess selections. . . .

This office considered the company's selections as invalid when made because the lands applied for were withdrawn for the State under the act of August 18, 1894, *supra*, that the departmental decision on review was determinative of the company's claim to the lands in question and that the fact of the applications to select presented by the State being in excess of the area required to satisfy its grants in no manner cured the invalidity of such selections.

Under this view of the matter, I am of opinion the order of suspension of November 20, 1908, should be revoked, the company's selections canceled, and the case closed as to the company.

It must be apparent from this recital that the State's selections must be rejected. The amount of land to which it is entitled on account of its university grant in satisfaction of which the selections in question were made, as compared to the selections, is negligible.

Moreover, if it be conceded that as a matter of administration the land department would be justified in permitting a transfer of these selections in satisfaction of other quantity grants to the State, yet, even so, the pending selections are largely in excess of the whole of the unsatisfied portion of all of such grants, and apart from the claim of the railway company, which it is conceived under such administrative adjustment might be entirely eliminated, there are claims of settlers of unknown extent which render such adjustment highly undesirable, if not impossible.

While the State selected these lands within the sixty-day preference right period accorded it by the act of 1894, such selections asserted no legal right under any grant except that for university purposes, and only to this grant as to the unsatisfied portion thereof, and being an excess selection may be rejected in its entirety, and, under the circumstances presented, the land department is constrained to take such action.

It is urged on behalf of the company, in substance: (1) That there was no such compliance on the part of the State with the provisions of the act of 1894 as worked a reservation of these lands from the date of its application for survey; that they were at the date of the company's selections nonmineral public lands, so classified as nonmineral at the time of the actual government survey, not reserved, and to which no adverse right or claim had attached, or had been initiated at the time of making such selections, and that, therefore, they were not thereafter subject to other appropriation or disposition. (2) That, admitting for the sake of the argument, though not conceding, that the State by its application for survey secured a preference right to select said lands in accordance with the provisions of the act of 1894, yet, if the State's selections failed for any cause other than defective application for survey, under well settled rulings of the land department, the company's right would attach as of the date of its selections, and that it would be entitled to priority over claims of any character subsequently initiated.

The prior adjudications in this case have proceeded upon the assumption that the State's application for survey of these townships was regularly filed, and that there was due compliance on its part with every essential requirement of law, the questions heretofore raised going to alleged failure of the Commissioner of the General Land Office to "withdraw" the land upon such sufficient application and the question of legality of a withdrawal of lands admittedly largely in excess of the State's grant for all purposes. The questions so considered were decided in favor of the State and those questions will not be reopened.

The law necessarily contemplated a withdrawal or reservation of more lands than were necessary to satisfy the State's grants, and the

failure of the Commissioner of the General Land Office to issue an order of withdrawal in further assurance of the legislative intention, could not jeopardize such right as was accorded the State by said act.

But the question of irregularity in the State's application is another matter, and is now raised for the first time. The facts, as they appear from the findings of your office and from an inspection of the original files and records thereof, are as follows: Under date of July 5, 1901, F. W. Hunt, Governor of Idaho, addressed a communication "to the United States surveyor-general for Idaho and the Hon. Commissioner of the General Land Office," for the survey, under the provisions of the act of 1894, of certain townships therein named, among others said township 44 north, range 2 east, and township 44 north, range 3 east, with a view to the satisfaction of its public land grants. This application bears evidence of having been received in the surveyor-general's office at Boise City, Idaho, July 8, 1901. It was forwarded by the surveyor-general with his letter to the Commissioner of the General Land Office, July 10, 1901, and was received in the General Land Office, July 15, 1901. The notice of this application for survey bears date July 6, 1901, and the duly certified sworn statement by the publisher of a weekly newspaper at Wallace, Idaho, shows that such notice was first published in the issue of such paper bearing date July 10, 1901, and that it was published in each succeeding issue thereof for the full period of six weeks, the last publication being in the issue dated August 14, 1901.

The act of August 18, 1894, provides:

That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor-General of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the Surveyor-General shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey, in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to

be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: *And provided further*, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided.

The foregoing statement of facts relative to notice contravenes the statement of counsel for the company on pages 48 and 49 of the brief that notice of the State's said application for survey "was never filed with the Commissioner of the General Land Office or at all," and that "it is matter of mere surmise when and how knowledge of the fact that the application had been filed with the surveyor-general was communicated to the Commissioner." Further notice of the argument, therefore, based upon this erroneous assumption of fact, is unnecessary.

But it is argued that the filing of the State's application for survey with the surveyor-general of Idaho is not an application "to the Commissioner of the General Land Office" within the meaning of the act of 1894; that the application above shown to have been received in the General Land Office, July 15, 1901, is still open to objection that the first publication of notice, July 10, 1901, was prior in time to the receipt of the application by the Commissioner of the General Land Office and was therefore premature, because the preference right given the State is upon the express condition that the Governor of the State shall publish a notice of such application for thirty days *after it shall have been made to the Commissioner of the General Land Office*.

The privileges conferred upon the State by this act were in derogation of the common right and its terms must be strictly construed, but the argument is drawn too fine. In the first place it is not by any means clear that an application filed with the surveyor-general, addressed to the Commissioner of the General Land Office, is not an application to such Commissioner within the meaning of this act; but, passing by this question, when such an application was received in the General Land Office it surely became an application to the Commissioner as of that date. Moreover, it would seem that a paper constituting an application and deposited in the mails properly addressed to the Commissioner of the General Land Office, would constitute such an application even before it was received by that officer, in so far as it was a necessary preliminary step to the publication of notice thereof by the State, and the law provides that notice shall be published after the application and not after its receipt by the Commissioner of the General Land Office. The Commissioner

had no office to perform with reference thereto prior to the required publication and such publication in nowise depended upon the action of the Commissioner then or thereafter.

It is noted that five of these publications, covering an intervening period of twenty-eight days, were in fact after the receipt of such application by the Commissioner. The contention of the company with reference to this notice can not be admitted. It is without substantial foundation in law or fact.

There thus remains only the further contention that when the State's selections failed the rights of the company attached as of the date of presentation of its lists. There is something in this argument but not so much as is claimed for it. It has never been held by this Department in a case where the State made its selections under the act of 1894 and in attempted exercise of its preference right, that upon the rejection of such selections intervening adverse claims for the same lands would be recognized as of the date proffered. Specifically, it has surely never been held that proffered selections by a railway company, under any law, for lands covered by a valid application for survey under the act of 1894, secured any legal rights whatever. This act provides that such lands shall be "reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office."

Now, at the date these railway lists were filed these lands were reserved from appropriation adverse to the State. No legal rights could, therefore have attached under such filing. The State afterwards selected the land and thereafter the question of its right thereto was one between it and the government, and that question was not complicated by the filing of intervening adverse claims, even though same were filed pursuant to and received in accordance with subsisting administrative policy. The contention made involves the consequence that in instances where, after the State's application for the survey of the township, under the act of 1894, shall have been defeated by placing the lands in a national forest, still the railway claim would not be defeated by the creation of such national forest, and, therefore, by indirection, the superior claim of the State would be defeated by the inferior one of the company. Such a consequence would be wholly unfair, was not contemplated, and can not be tolerated.

If, as matter of administration, and for the preservation of equities, the land department should determine to recognize priority in the initiation of these claims, inasmuch as it has permitted the filing thereof while the lands were so reserved for a special purpose, upon

the failure of such purpose it is believed this could legally be done, but while not fully advised of the situation with such minuteness as is desirable, enough of it is known to justify the conclusion that some of this land is covered by the claims of settlers and such claims, initiated as they probably were, in the belief that the State's preference right might not be asserted or might for other reason fail as to the lands settled upon, are, under uniform rulings of the land department and the courts, entitled to the first consideration.

In the adjustment of the equities of settler-claimants the question of good faith in the initiation and maintenance of such claims is of primary importance. The company's said lists Nos. 133 and 135, embraced selections of unsurveyed lands, and it having been determined under the circumstances of this case that such selections initiated no legal right, it follows that the filing thereof was not the assertion of such claim as would prevent a settler from acquiring equities which it is the purpose of this adjustment to protect. But after the filing of the township plats of surveys and on July 31, 1905, which was within the time allowed by law, the company filed its additional lists adjusting these selections to the lines of the public surveys. These additional filings gave precision to the company's claim and such notice thereof to the public as would prevent the initiation of rights by settlement thereafter upon the lands so selected. This being true, in the consideration of settlement claims your office will reject such as are based upon settlement made subsequently to July 31, 1905. As to such settlement as may have been begun prior to that date, if made in good faith by a qualified homesteader, and since maintained in accordance with law, priority will be accorded, and upon the allowance of entry for the lands so settled upon the company's selection will, to that extent, stand rejected.

If entries of any sort have been inadvertently or mistakenly allowed for any of these lands, they will rest on the same basis as settlement claims, and if they do not fall within the rule above laid down for the adjustment of such claims, they will be canceled. After the adjustment of these claims clear lists of the company's said selections will be forwarded for the approval of the Secretary of the Interior unless objection arises not herein considered.

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#### INSTRUCTIONS.

##### WATER SUPPLY FOR TOWNS WITHIN RECLAMATION PROJECTS.

Applications for water rights under the reclamation act by individual lot owners for lands which have been subdivided into town lots will not be allowed; but water may be supplied to towns from reclamation projects by delivery to some convenient point to be handled and distributed to the inhabitants of the town by the municipal authorities in accordance with the provisions of the act of April 16, 1906.

*Secretary Fisher to the Director of the Reclamation Service, March 21, 1911.*

I am in receipt of your letter of March 15, 1911, transmitting papers and making recommendation with reference to the matter of supplying water from reclamation projects to lands included within the limits of towns or additions thereto.

The question is presented at this time in connection with applications for water from the Klamath Project by certain lot owners in the Mills and other additions to the town of Klamath Falls, Oregon. The suggestion of the General Land Office is to have filed in the office of the Project Engineer, the local land office, and the General Land Office, authenticated copies of the subdivisional plats of the townsite additions, the irrigable area of each lot to be determined by the Project Engineer and water right applications presented by lot owners to be certified and disposed of upon descriptions based upon the subdivisional plats. Reference is made to applications heretofore allowed in the Carlsbad Project, but in that case the lots appear to be in the nature of suburban villa sites, ranging from three to five acres in area, generally planted in orchards and not included in a regularly platted and organized townsite. It is indicated that in certain other projects some water right applications by the owners of lots in towns have been presented and filed, and payments of construction charges received.

You point out difficulties which will be encountered in attempting to furnish water to individual lot owners in towns; involving street-crossings, construction and care of culverts and numerous small laterals, and possible controversies between the lot owners, the townsite authorities and the Department. Attention is also directed to the difficulty of enforcing the residential requirement of the reclamation act as to town lots and of the impossibility in many cases of the owners of small lots, with improvements thereon, making proof of reclamation of one-half the land for agricultural purposes as required by the law. You recommend that no further water right applications be allowed by individual lot owners for lands which have been subdivided into town lots and that the water right applications already allowed in such cases be carefully investigated to the end that those where compliance with the law has not been had be canceled and those where compliance has been had may be adjusted.

It seems evident from the language of the act of June 17, 1902, and from the purpose thereof, that it was intended to relate to the reclamation of lands for agricultural purposes and not for urban uses. This view is supported by the fact that Congress subsequently, in the same act which authorizes the subdivision of public lands connected with reclamation projects for townsite purposes, made special



provision for furnishing towns in or near reclamation projects with water. (Act approved April 16, 1906, 34 Stat., 116). Section 4 of the said act is as follows:

That the Secretary of the Interior shall, in accordance with the provisions of the Reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.

It seems clearly apparent, therefore, that Congress intended to distinguish in the method of supplying water from reclamation projects between lands utilized for agricultural or horticultural purposes, and lands included in cities and towns, divided into non-agricultural lots for the homes and places of business of townsite residents. In the latter class of cases, recognizing the physical, and other, difficulties connected with the delivery of water to towns and cities, Congress provided "for the delivery of such water supply to some convenient point," thereby impliedly recognizing that the city water supply could best be handled and distributed by the municipal authorities.

Your recommendation is accordingly approved and you are directed to prepare, in cooperation with the General Land Office, appropriate instructions for consideration by the Department to the end that no further water right applications shall be accepted where the lands have been subdivided into residence and business lots of such form and area as to indicate a use thereof for townsite rather than for agricultural purposes. Such investigation of, and report upon, applications heretofore allowed for water in connection with town lots of the character indicated will be had as to enable the disposition of same, either by cancellation or by proper adjustment upon receipt of the reports or upon the filing of applications for water by the townsite authorities.

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PATRICK FLYNN.

*Decided March 21, 1911.*

**RESIDENCE—MARRIED WOMAN.**

The legal residence of a wife is presumed to be that of her husband, and where both husband and wife at the time of marriage have an unperfected homestead entry, they can not thereafter maintain separate residences upon

and perfect both entries; but where at the time of marriage the wife only has an unperfected homestead entry, and thereafter continues to reside thereon and otherwise comply with law, she is entitled to perfect the entry, notwithstanding her husband in the meantime is maintaining a separate residence upon his own patented homestead entry to which he had perfected title prior to their marriage.

*PIERCE, First Assistant Secretary:*

November 28, 1904, Ellen M. Coleman made homestead entry No. 8167, at Santa Fe, New Mexico, for the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 25, T. 32 N., R. 24 E., N. M. P. M. She was married April 24, 1905, to Patrick Flynn. February 7, 1906, she offered commutation proof, but no cash certificate was issued, because of a protest filed by a special agent of the General Land Office. An adverse report having been made thereon, the Commissioner of the General Land Office, on June 14, 1906, directed the register and receiver to issue notice of the following charges:

March 23, 1906, Special Agent Frank Grygla submitted report recommending that the entry be canceled for the reason that the land was more valuable for coal than any other purpose, and that the entry was made for the purpose of obtaining the coal; that claimant married (date not given) a man named Flynn, foreman of a mining company operating near claimant's entry, who had also made a homestead entry and sold the same to said mining company.

In his instructions to the register and receiver, the Commissioner stated that proof had not been submitted, the proof having apparently been retained in the local office. A hearing was thereupon had January 14, 1907, at which the special agent appearing stated that on January 30, 1906, one Ellis Denton wrote the register and receiver that upon the land, which was being advertised for commutation proof, there appeared a vein of coal of from three to four feet thick, and that there were other outcroppings on the same land, and that on either side of it veins of coal from four to six feet in thickness had been disclosed. He further stated that upon this complaint he made the investigation, and he found that the coal veins had been exposed and prospected on adjoining land, as well as on the claim of Mrs. Coleman. Upon the testimony taken at that time, the register and receiver, July 31, 1907, found that the land having been withdrawn October 16, 1906, was *prima facie* coal land; that her proof should remain suspended, to await the result of the proposed examination of the land by the government geologists, and that if their examination should show that the land is not coal land, final certificate should be issued; but if the examination did show the land to be valuable for coal, the proof should be rejected, without further proceedings. Thereafter it appears that another hearing was held, May 18, 1908, by direction of the register and receiver. The claimant in the meantime had died, and at this hearing Patrick Flynn, her husband, appeared as the defendant.

The lands were classified as coal August 27, 1910—the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  at \$225 per acre, and the remainder at \$250 per acre. After the second hearing, the register and receiver, by their decision of March 31, 1909, found that the land was underlain by a valuable deposit of coal, and that the coal is of greater value than the agricultural use to which the tract could be put; that while the entryman might not have had, and probably did not have, actual knowledge of the existence of coal upon the land, yet all the surrounding facts and circumstances were such as to have placed a reasonably intelligent and prudent person upon inquiry, and they recommended the cancellation of the entry. Upon appeal, the Commissioner of the General Land Office, by his decision of October 19, 1910, affirmed the action of the register and receiver, and further held that, the commutation proof showing that during the time the entrywoman claimed to have resided on the land, her husband lived upon his patented homestead, about one and a half miles away from her house, under the decisions in the case of *Jane Mann* (18 L. D., 116) and of *Anderson v. Hillerud* (33 L. D., 335), the residence of the husband was presumed to be that of his wife, she therefore had not complied with the law as to residence. From the decision of the Commissioner an appeal to the Department has been duly prosecuted.

It is contended by appellant that the charge, as issued by the Commissioner, was not sufficient, as it did not contain an averment that the land was coal land, and known to be coal land at the time of proof. It should be noted that the Commissioner was apparently without knowledge that commutation proof had been submitted at the time of drafting the charges. Further, it appears that at the first hearing such a charge was distinctly preferred by the special agent, and the hearing was conducted upon that theory. No such objection was made by the claimant at either hearing, and it is too late to raise the objection for the first time upon an appeal to the Commissioner of the General Land Office.

Upon the entire record, the Department is satisfied that the land was coal land, and known to be coal land at the time of the submission of commutation proof. One of the proof witnesses states that he can not say whether the land is more valuable for agriculture or coal, that there had been coal found in the neighborhood, but not on that particular tract. There is nothing in the record, however, which discloses a lack of good faith in the initiation of the entry. In fact, it is entirely probable that the entrywoman was ignorant of the fact that the land is underlain with coal, at the time of making her homestead entry. There would, therefore, seem to be no objection to the issuance of final certificate and patent, with a reservation to the United States of the coal deposits, unless the claimant was in default in the matter of compliance with the homestead law, as found by the Commissioner.

The commutation proof discloses that the entrywoman began the construction of the house in the latter part of November, 1904; that it was finished, and she moved into it, the following April. She had a two-room log house, well, barn, and about three or four acres plowed, the total value of the improvements being given as \$300. The proof further shows that she lived continuously on the land from April, 1905, until the submission of commutation proof. The testimony at the hearings largely corroborates the statements contained in the proof. She herself testified that after her marriage she continued her residence upon the land, visiting her husband at intervals upon his own land, which was patented December 20, 1904. Other witnesses corroborate her in this, and, in fact, it seems to be conceded in the record that she complied with the homestead law.

The case of Jane Mann, *supra*, cited by the Commissioner, is not applicable. In that case both husband and wife had unperfected homestead entries, and the Department held that a husband and wife, while living together in such relation, could not each maintain a homestead entry at the same time. At page 117 the Department pointed out that it had repeatedly held that the entrywoman lost no right acquired under the homestead law simply by her marriage, provided that after marriage, as before, she continued to comply with the law.

In the case of Anderson *v.* Hillerud, *supra*, it was held that where a woman having an unperfected homestead entry married a man having a similar entry, and thereupon abandoned her claim and resided with her husband on his claim until he offered final proof thereon, and they then established residence upon her claim long prior to the initiation of a contest against it, she thereby cured her default in the matter of residence, and was entitled to perfect her entry. At page 337 the Department quoted from the unreported case of Garrett Williams, and it is probable that it is upon the following language that the Commissioner relied in this case:

The legal residence of the wife is wherever her husband resides; and therefore if, after her marriage, she should continue to reside on a tract for which she had previously made entry, while her husband resided on a different tract, she would be in default in the matter of residence on her claim.

Taken by itself, the language might justify the Commissioner's conclusion; but it should be noted that the context shows that the Department was speaking of a case in which both husband and wife had unperfected homestead entries; in other words, where both husband and wife have unperfected entries, they can not perfect both, but must elect which one of the two entries they desire. In the present case the husband had already perfected his own homestead entry, and, upon the record, the wife continued to reside upon her entry and comply with the law after her marriage. While the legal

residence of the wife is presumed to be that of her husband, such presumption is not conclusive, and where, as in the present case, the proof shows a sufficient residence on her part, the entry should not be canceled.

The matter is accordingly remanded, with instructions that the claimant be allowed sixty days from notice hereof to file an election to take a patent with a reservation to the United States of the coal deposits, otherwise the entry will be canceled.

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### ALASKA COMMERCIAL COMPANY.

*Decided March 21, 1911.*

#### ALASKAN LANDS—OCCUPANCY—RESERVATION BY GOVERNMENT.

Occupancy of land in the District of Alaska and survey thereof under the act of May 17, 1884, confer no such right against the United States as will prevent reservation thereof for its own uses.

#### SOLDIERS' ADDITIONAL LOCATION—OCCUPANCY AND IMPROVEMENT.

A soldiers' additional right attaches only from the date of the application to locate the same, and prior occupancy and improvement of land can not avail as the initiation of a claim under an application to locate a soldiers' additional right.

#### PIERCE, *First Assistant Secretary*:

This appeal is filed by the Alaska Commercial Company from a decision of the General Land Office suspending the survey of its location under soldiers' additional right of 23.90 acres situated near the town of Kodiak, on Kodiak Island, Alaska, and requiring that said survey be so amended as to eliminate therefrom all land embraced within the reservation for a United States agricultural experiment station.

By proclamation of May 28, 1898, certain land of Kodiak Island, in Alaska, was set apart for the agricultural experiment station, which was surveyed in August of that year and the boundary staked. July 19, 1908, the survey in question was made for the Alaska Commercial Company, under its application to locate the same with soldiers' additional right. That survey conflicts, in part, with the reservation made for the Government agricultural experiment station and appellant was required to eliminate the part in conflict, which is the matter in controversy.

Appellant claims to have occupied the tract since 1883 and that the land so occupied was embraced in survey No. 562, made under authority of May 17, 1884 (23 Stat., 24), providing that "Indians, or other persons in said district, shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

It may be admitted that appellant has been in the undisturbed possession of the entire tract embraced in said survey prior to and ever since the act of May 17, 1884, but it acquired by such occupancy no vested right against the United States either under that act or the act of March 3, 1891 (26 Stat., 1095), or the act of March 3, 1903 (32 Stat., 1028).

Although such occupancy may be sufficient to protect the occupant against the claims of other individuals, it is inoperative to prevent the United States from reserving the land for its own uses. *Russian-American Packing Co. v. U. S.*, 199 U. S., 570.

But, independently of this, appellant is seeking to acquire title to the land by the location of soldiers' additional right which attaches only from the date of the application to locate it or make entry thereunder. It is not a settlement right but "merely a bounty having no more reference to the body of the homestead law than had any other of the many acts granting military land bounties, except that it made reference to the homestead acts to point out and identify the beneficiaries." (*Cornelius J. MacNamara*, 33 L. D., 520.)

No residence, cultivation, or improvement is required as a condition to the acquisition of title under such right and prior occupancy and improvement of the land can not avail as the initiation of a claim under an application to locate it.

The decision of the General Land Office is affirmed.

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#### NORTHWESTERN FISHERIES COMPANY.

*Decided March 21, 1911.*

#### ALASKA LANDS—SURVEY—SOLDIERS' ADDITIONAL—NATIONAL FOREST.

Rights initiated by survey of land and approval thereof by the surveyor-general preliminary to location of soldiers' additional rights in Alaska under the act of May 14, 1898, and regulations issued thereunder, are saved and protected by the proclamation including the lands within the limits of the Tongass national forest, so long as diligently prosecuted toward final entry.

#### PIERCE, *First Assistant Secretary*:

This is the appeal of the Northwestern Fisheries Company from a decision of the Commissioner of the General Land Office, December 8, 1910, rejecting its application as assignee of Wilder D. Jones, under section 2306 of the Revised Statutes, to locate lands embraced in United States survey No. 210, on the northeast side of Santa Ana Inlet, western shore of Cleveland Peninsula, latitude 56 north, longitude 132 west, Juneau land district, Alaska.

The validity of this soldiers' additional right and the sufficiency of the assignment thereof to the said company are not questioned,

the decision of the Commissioner of the General Land Office being put upon the ground that the survey of this tract was not such legal appropriation as excepted it from the force of a proclamation including it within that part of the Tongass National Forest added thereto by executive order of February 16, 1909 (35 Stat., 2226).

The date of the application of the company for the survey of this tract is not stated, and from informal inquiry in the surveying division of the General Land Office it would appear that the application itself is not in the files of that office. It may be that no formal application was made, as under existing law such application was not necessary. "Under the present law the claimant at his own expense can procure the making of the survey without first making application to the surveyor-general, but the survey when made is to be submitted to and approved by the surveyor-general." See regulations (32 L. D., 424, 429). It appears, however, that the survey was made in the field July 25 and 26, 1908; that it was approved by the surveyor-general of Alaska, February 11, 1909, all of which was before the proclamation aforesaid of February 16, 1909. July 7, 1909, subsequent to such proclamation, John R. Winn, agent and attorney-in-fact for said company, applied to locate the survey under said soldiers' additional right.

Section one of the act of May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes" (30 Stat., 409), provides, in part:

That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior.

While provision was made by section ten of that act for the survey of lands in the possession and occupancy of citizens and corporations in the District of Alaska, for the purposes of trade and manufacture, yet no specific provision is found for the survey of lands sought to be appropriated under soldiers' additional homestead rights. Departmental regulations of June 8, 1898 (27 L. D., 248), recognized and noted this omission and directed that special surveys of such lands be made "in the manner provided for in section ten of this act, at the expense of the applicant," and the survey in question appears to have been made in accordance therewith.

The proclamation of February 16, 1909, contained the following language:

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws, or reserved for any public purpose, be subject to and shall not interfere with or defeat legal rights

under such appropriation nor prevent the use for such public purpose, of lands so reserved, so long as such appropriation is legally maintained or such reservation remains in force.

With reference to the assertion of claim involved in the preliminary steps for the survey of this land, it seems clear that the survey thereof in the field and the approval of such survey by the surveyor-general, February 11, 1909, was a legal appropriation under the public land laws and whatever rights attached by such approval, were not defeated by the withdrawal. The evident purpose of the exception in the proclamation was to protect such claims if they were thereafter diligently prosecuted to final entry. Under the law and regulations one desiring to locate a soldiers' additional homestead right in Alaska, might have survey of the land intended to be located, and after approval by the surveyor-general file the plat of such survey in the local land office. These steps are preliminary to actual location in the land office and are rendered necessary because of lack of government surveys in said district. Can it be said that another might appropriate a tract as against one proceeding in conformity with departmental regulations to identify it by appropriate survey before making entry? If not, it must be because such prior claimant had initiated a claim which might ultimately ripen into a legal right. Under such circumstances the claimant should not be denied the right to perfect his claim unless he has been guilty of negligence. The cases cited by the Commissioner of the General Land Office in support of his decision are not controlling. In those cases large areas of land had been withdrawn, upon application by the State, for the survey of certain townships, under the act of August 18, 1894 (28 Stat., 372). Under that act the State was accorded a preference right of selection of lands within the townships to be surveyed for a period of sixty days from and after the filing of the plats of survey in the local land office. Although the lands were reserved from appropriation adverse to the State from and after the filing of such application for survey, yet the application was not an expression of intention to claim any certain tract within the townships to be surveyed. The State might not, upon survey, desire to make selection of any of the lands, and it was only by selection that a right was initiated to any specific tract, and this could not precede the filing of the plats. In the case under consideration the law gave, as has been seen, the right to locate soldiers' additional rights upon unsurveyed lands in the District of Alaska and the regulations under the law authorized the actual location of the scrip. The survey here in question was made as the regulations provided, was preliminary to the location, and was limited to the location and in furtherance thereof. The area embraced in the survey coincides with



the extent of the company's claim, and if it has complied with the further provisions of law and the regulations governing the acquisition of lands in Alaska in the exercise of soldiers' additional rights, its claim must be sustained.

The decision appealed from is reversed with directions to the Commissioner of the General Land Office to pass upon the sufficiency of the company's compliance with law, and to allow the entry in the absence of objection not herein considered.

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**COMPULSORY ATTENDANCE OF WITNESSES—AMENDMENT OF CIRCULAR  
OF JUNE 27, 1904.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, March 22, 1911.*

**REGISTERS AND RECEIVERS, CHIEFS OF FIELD DIVISION, SPECIAL AGENTS,  
AND SPECIAL DISBURSING AGENTS.**

GENTLEMEN: The circular of June 27, 1904 (33 L. D., 58), which amended the circular of instructions of March 20, 1903 (32 L. D., 132), regarding the provisions of the act of January 31, 1903 (32 Stat., 790), entitled "An act providing for the compulsory attendance of witnesses before registers and receivers of the land office," is hereby modified to read as follows:

The second section of the said act of January 31, 1903, provides in part that "the fees and mileage of witnesses shall be the same as that provided by law in the district courts of the United States in the district in which such land offices are situated."

*The general law* fixing the fees of witnesses for attendance upon United States Courts to which reference must be had in determining the fees and mileage allowed under the act of January 31, 1903, is found in section 848, Revised Statutes, which is as follows:

SEC. 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.

The act of May 27, 1908 (35 Stat., 377), provides a special rate of mileage and a special compensation for attendance in certain states and territories. The provision of the act is as follows:

Jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, and Utah, and in the Territories of New Mexico and Arizona shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, three dollars a day, and fifteen cents for each mile necessarily traveled over any stage line, or by private conveyance, and five cents for each mile by any railway or steamship in going to and returning from said courts: *Provided*, That no constructive or double mileage fees shall be allowed by reason of any person being summoned as both a witness and juror, or as a witness in two or more cases pending in the same court and triable at the same term thereof.

The 4th section of the act of January 31, 1903, provides:

That whenever the witness resides outside the county in which the hearing occurs any party to the proceeding may take the testimony of such witness in the county of such witness's residence in the form of depositions by giving ten days' written notice of the time and place of taking such depositions to the opposite party or parties.

1. No witness can be compelled to appear before the land office or any other officer outside the county in which the subpoena may be served, and no mileage fees should be demanded or paid except for distance necessarily traveled by the shortest usually traveled route between the land office and points in the same county, or, when depositions are taken, between points in the county of the witness's residence; nor should any attendance fee be allowed or paid a witness for time consumed in going to or returning from the place where the hearing is held or deposition taken, except in those states or territories to which the act of May 27, 1908, *supra*, applies.

2. Where the same person appears as a witness in more than one case at the same time, between the same parties, you should tax the mileage fees to be received by him as costs in the first case in which action is taken, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of. In the event that a witness testifies in more than one case between the same parties on the same day, he is entitled to but one per diem fee.

3. Under the provisions of section 848 of the Revised Statutes and the act of May 27, 1908, a witness is entitled to receive the amount allowed by these statutes for each day's attendance before the officer taking the testimony, in each case in which he may have been in attendance pursuant to law, regardless of the fact that he may have been in attendance as a witness in more than one case before the same officer at the same time. This is a general rule applicable to all cases and to all parties. Each witness who attends a hearing before a United States land office is entitled to receive the mileage provided by law for the distance actually and necessarily traveled

within the county in which such land office is located. Each witness whose deposition is taken under section 4 of the act of January 31, 1903, *supra*, is entitled to mileage for the distance actually and necessarily traveled within the county of his residence. In cases where a witness is required to be in attendance in more than one case before the same officer at the same time or on successive days, one subpoena only should be issued, and the cases in which his presence is desired should be particularly designated therein.

4. Any witness who attends any hearing or the taking of any deposition at the request of any party to the controversy, or at the request of the attorney or duly authorized agent of such party, without having been subpoenaed to so attend, should receive the same mileage and attendance fees to which he would have been entitled if he had been first duly subpoenaed as a witness on behalf of such party.

Care should be taken that payments to clerks and other officers of the United States for necessary expenses in going, returning, and attendance at the hearing are made under the provisions of section 850 of the United States Revised Statutes.

The register and receiver alone are authorized by this office to employ a stenographer where one becomes necessary to reduce the testimony to writing. Where a commission is issued to an officer to take depositions it is his duty to provide for the necessary clerical services to comply with such commission, at his own expense, and he is entitled to the fees allowed by law for taking depositions.

The voucher of the officer taking a deposition must cite the statute under which he claims fees for his services.

Very respectfully,

FRED DENNETT, *Commissioner*,

Approved:

FRANK PIERCE, *Acting Secretary*.

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TED E. COLLINS.

*Decided March 23, 1911.*

**SOLDIERS' ADDITIONAL APPLICATION—WITHDRAWAL—SURFACE PATENT.**

A soldiers' additional application presented prior to the act of June 22, 1910, for land theretofore withdrawn by departmental order from filing or entry under the coal land laws, is within the proviso to the first section of the act of June 22, 1910, and applicant is entitled to carry the application to completion and receive the restricted patent provided for by that act, notwithstanding a subsequent executive withdrawal of the land for coal classification under the act of June 25, 1910.

PIERCE, *First Assistant Secretary*:

Ted E. Collins, assignee of William L. Lee, has appealed from decision of January 25, 1911, by the Commissioner of the General Land Office, rejecting his application to make entry, under section 2306, Revised Statutes, for the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 14, T. 37 N.,

R. 1 W., M. M., Great Falls, Montana, land district, containing 40 acres, based on the alleged military service of William L. Lee for more than ninety days during the civil war in the army of the United States, and his homestead entry, made September 15, 1868, at Omaha, Nebraska, for 80 acres, which was canceled for abandonment July 15, 1870.

The Commissioner states that the records of his office show that the township embracing the land applied for was withdrawn October 15, 1906, from filing or entry under the coal-land laws, also any other entry, filing, or sale by departmental order of November 7, 1906, modified to apply to coal entries merely December 17, 1906, and further under coal-land withdrawal, Montana No. 1, Executive order of July 9, 1910, under the act of June 25, 1910 (36 Stat., 847). It was held that the said latter withdrawal excepted from the provision thereof only homestead or desert-land entries or settlement rights, and that the application of Collins, which was filed October 15, 1909, was not such an appropriation of the land as prevented the withdrawal from attaching.

The land applied for having been withdrawn prior to the filing of the application, it would appear that the claimant is entitled to have his case considered under the proviso to the first section of the act of June 22, 1910 (36 Stat., 583), which reads as follows:

That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

The withdrawal under the act of June 25, 1910, did not defeat the right to consideration under the above law. See instructions of March 6, 1911, and departmental decision of March 11, 1911, in the case of Gunn, assignee of Waid.

The decision appealed from is reversed, and the case is remanded for consideration as above indicated.

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BURTIS F. OATMAN.

*Decided March 23, 1911.*

**NATIONAL FOREST HOMESTEAD—ACT JUNE 11, 1906—ENLARGED HOMESTEAD.**

Lands within a national forest listed under the act of June 11, 1906, as subject to homestead entry, may be appropriated only under that act; and the fact that they are also embraced within a larger area designated as of the class subject to entry under the enlarged homestead act of February 19, 1909, does not render them subject to disposition under said act.

*PIERCE, First Assistant Secretary:*

Burtis F. Oatman has appealed from decision of December 3, 1910, of the Commissioner of the General Land Office, holding for cancel-

lation his homestead entry made July 14, 1909, for the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 23, and W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 26, T. 27 S., R. 13 E., Lakeview, Oregon, as additional to his former homestead entry made July 8, 1908, under the act of June 11, 1906 (34 Stat., 233), for the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 23, same township and range.

All of said township with the exception of Sec. 36 thereof, was withdrawn September 17, 1906, for the Fremont National Forest. The lands in said township were also designated by the Secretary of the Interior April 27, 1909, as being of the character subject to entry under the provisions of the enlarged homestead act of February 19, 1909 (35 Stat., 639). Also the lands embraced in the original and additional entries were listed and opened to entry under the said act of June 11, 1906.

The Commissioner held that the lands having been opened for entry only under the act of June 11, 1906, were not subject to entry under the enlarged homestead act.

The said act of June 11, 1906, authorized the Secretary of Agriculture upon application or otherwise and within his discretion to examine and ascertain as to the location and extent of land within forest reservations which are chiefly valuable for agriculture and which in his opinion may be occupied for agricultural purposes without injury to the forest reservation, and which are not needed for public purposes, and to list the same with the Secretary of the Interior with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and the said act, and it is further provided that "upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length," after proper posting and publication of the notice of such opening as designated in the act. Said act permits entry of either surveyed or unsurveyed lands.

The said enlarged homestead act of February 19, 1909, provides that any person who is a qualified entryman under the homestead laws may enter by legal subdivisions under the provisions of said act 320 acres or less of "nonmineral, nonirrigable, unreserved and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body and not over one and one-half miles in length," after the land shall have been designated by the Secretary of the Interior as of the character described. Section 3 of said act providing for additional homestead entries thereunder reads as follows:

That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry

which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

Usually, designations of lands under the enlarged homestead act are made in large areas and without particular regard to the status of such lands. Such designation refers only to the character of the lands and not to their status. An area thus designated may, and doubtless generally does, embrace some lands covered by prior entries or segregated by other appropriation or lands held in reservation of some character. In such case the designated lands which are thus segregated or reserved or held subject only to a particular class of entry are not by such designation rendered subject to entry under the enlarged homestead act. The designation as to such lands is not effective but remains in abeyance during the continuance of such segregation or reservation and only becomes effective when such objections thereto shall have been removed.

In the case under consideration the lands had been designated as being of the character of lands which, if no other objection appeared, could properly be entered under the provisions of the enlarged homestead act. They had also been listed and opened to entry under the provisions of the act of June 11, 1906. The forest reservation was abrogated to that extent and for that purpose and no other. The said act restricts entry thereunder to 160 acres in area and to one mile in length and permits entry of unsurveyed lands. These provisions are not consistent with the said enlarged act which permits entry only of surveyed lands and to the extent of 320 acres in area and one and one-half miles in length. Therefore, the latter act can not be properly applied to lands having such status, but entry thereof must be governed by the law enacted especially for that purpose.

This entryman had already exhausted his right under said act of June 11, 1906, by making entry for the full area of 160 acres thereunder, and as the enlarged act has no application herein, it follows that the entry was unauthorized.

The decision appealed from is accordingly affirmed.

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#### RECLAMATION—NORTH PLATTE PROJECT—PAYMENT.

##### ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, March 24, 1911.*

1. In pursuance of the act of Congress approved February 13, 1911 (Public—No. 353), entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section 4 of the Reclamation Act and for other purposes," the following order is

promulgated for the purpose of relieving the present situation on the North Platte project, pending the issue of public notice modifying or abrogating the notices heretofore issued: this being a revision of the order of March 7, 1911.

2. (a) A stay of proceedings looking to the cancellation of entries or water right applications because of failure to make payment will become effective as to all entries or water right applications subject to public notices heretofore issued (except public notices prior to March 3, 1909) for which a payment on account of the building charge has been heretofore made. (b) Such stay shall also apply to those applications for which no payment on the building charge has been made if on or before March 31, 1911, payment is made of not less than 50 cents per acre on account of the building charge payable thereunder.

3. Such stay of proceedings shall remain in effect only until June 15, 1911, and water will be furnished to both classes described in paragraph 2, until said date without payment of the charge for operation and maintenance. If part payment of the charge for operation and maintenance, to the amount of 25 cents per acre, be made on or before June 15, 1911, such stay of proceedings shall continue until further announcement by means of a permanent public notice or otherwise. The remainder of the charge for operation and maintenance for 1911, amounting to \$1.00 per acre in addition to the 25 cents stated above, shall be paid on or before December 1, 1911.

4. Upon failure to make payment on account of the building charge as herein required on or before March 31, 1911, the entry or water-right application, or both, as the case may be, which would otherwise be subject to cancellation will be promptly cancelled without further notice. In case of failure to pay the portion of the charge for operation and maintenance herein required on or before June 15, 1911, no further water supply will be furnished.

5. This order shall not be construed to operate as a stay of proceedings in relation to entries or water-right applications which are subject to the building charge of \$35 per acre.

FRANK PIERCE,  
*Acting Secretary of the Interior.*

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HIRAM M. HAMILTON.

*Decided March 25, 1911*

**FOREST LIEU SELECTION—RIGHTS OF INNOCENT PURCHASER.**

Under the exchange provisions of the act of June 4, 1897, the selection of lands in lieu of other lands within a forest reserve relinquished to the United States with a view to such selection, can only be made by or in

behalf of the owner of the lands relinquished; and one claiming to be an innocent purchaser of the selected land or the right of selection will not be recognized as entitled to obtain any right superior to that of the owner of the relinquished land.

**LAND FRAUDULENTLY ACQUIRED NOT RECEIVED AS BASE.**

The land department will not lend its agency to permit the government to become receiver of lands as base for forest lieu selection where it has knowledge that title thereto was obtained by fraud.

*PIERCE, First Assistant Secretary:*

February 6, 1902, Hiram M. Hamilton, by his attorney in fact, F. H. Crombie, filed in the local land office at Coeur d'Alene, Idaho, lieu selection No. 5002, under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 32, T. 58 N., R. 2 W., B. M., in lieu of the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 36, T. 7 S., R. 22 E., M. D. M., California.

A special agent of the General Land Office made an adverse report against said selection and certain other selections by Hamilton, and by order of December 28, 1903, the Commissioner of the General Land Office directed that a hearing be had upon the following charge:

That the alleged title derived from the State of California to the above described subdivisions was illegally obtained and is fraudulent in this, that the application presented under section 3495 of the political code of the State of California was not filed for the use and benefit of the applicant, Charles J. Blake, but for the use and benefit of another party, to wit, Hiram M. Hamilton; that the affidavit as to the statement that he desires to purchase the same (land heretofore described) for his own use and benefit and for the use and benefit of no other person or persons whatsoever, required by section 3495, is false; that in view of such false statement his right to purchase was by virtue of section 3500 of the political code of the State of California defeated, as was also his right to secure any evidence of title.

Notice was duly issued on the charge and Hamilton filed sworn answer denying same and requesting a hearing. The Inland Lumber and Timber Company also filed an application to intervene for the reason that it had by purchase become the owner of and entitled to the rights of said F. H. Crombie to the lands embraced in the selection. Said company was allowed to intervene and a hearing was duly had. The local officers recommended that the proceedings be dismissed. The Commissioner by decision of November 28, 1910, reversed the action of the local officers and rejected the said selection subject to the right of appeal. An appeal by the said intervener, the Inland Lumber and Timber Company, has brought the case before the Department for consideration.

The facts, set out at length in the decision of the Commissioner, show clearly that the base land was procured fraudulently by Hamilton through the application of one Charles J. Blake. The charge



upon which the hearing was had is fully sustained by the evidence, and it is deemed unnecessary to recite the record at length as the facts are sufficiently stated in the decision of the Commisisoner.

It is claimed upon behalf of the said Inland Lumber and Timber Company that it purchased the right of Hamilton to make selection and accordingly made selection of this land in the name of Hamilton by Crombie as attorney in fact, who was the president and general manager of the said company.

This selection was made in the name of Hamilton, and it could not have been made in the name of another, as Hamilton was the purported owner of the base land. In the case of John K. McCornack (32 L. D., 578), it was held that:

Under the exchange provisions of the act of June 4, 1897, the selection of lands in lieu of other lands within a forest reserve relinquished to the United States with a view to such selection, can only be made by or in behalf of the owner of the lands relinquished.

Such has been the uniform holding of the Department and this view is adhered to. It follows therefore that the only other question to be considered is as to the title of the intervener under the selection of Hamilton. If Hamilton had not an unimpeachable title to the base land, this claim must fail, as the intervener can not, as alleged innocent purchaser of the selected land or the right of selection, be permitted to obtain a right superior to that of Hamilton, the selector. The following decisions have application here.

The Department must deal directly with its own vendees, with the persons with whom it contracts. It can not undertake to follow the transfers of the grantees, and to settle questions that may arise upon such transfers, but must leave such matter for determination in the courts. *R. M. Chrisinger* (4 L. D., 347).

In the case of *Smith v. Custer et al.* (8 L. D., 269), which involved a purchase from an entryman under the preemption law after issuance of final certificate but prior to patent, it was held as follows:

Whatever claim to patent he [the entryman] possesses by virtue of his payment and certificate is dependent upon the further action of the Department and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites, prescribed by law to the rightful acquisition of the public land he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses. The purchaser is chargeable with knowledge of the law, which includes knowledge of this law; and is chargeable with knowledge of the state of the title which he buys, in so far, at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the land office and Department upon which a patent may issue. He is not then an "innocent purchaser," so far as there may exist reasons why that patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the Department. He buys a title *sub judice*. At the most, it is but an equitable title, the

legal title being in the government. It is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of his vendor, and has no better standing than he. *Boones v. Chiles* (10 Peters, 177); *Root v. Shields* (1 Woolworth, 340).

See also *Hawley v. Diller* (178 U. S., 476).

If such be the rule where the entryman has acquired an equitable title, how much stronger must be the application of the same principle in a case where his claim has not reached even the dignity and force of an equitable title; and it has been held that a selector has not acquired an equitable title to lands selected under this act until his selection has been approved by the Commissioner. See the case of *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S., 301).

It is established that Hamilton by fraud acquired purported title to the base land, and therefore his alleged title was spurious and illegal at the time he offered same to the Government. Having knowledge of the perpetration of the fraud, the Department will not be influenced by the fact that it might, by approval of the selection, acquire for the Government, owing to its immunity from suit, an unassailable title to the base land. The Department will not knowingly lend its agency to permit the Government to become receiver of lands fraudulently obtained.

In the case of *Hyde v. Shine* (199 U. S., 62, 83), which involved a criminal proceeding for defrauding the Government by procuring public lands under the act of June 4, 1897, through exchange of base lands fraudulently procured from certain States, it was stated:

Even if the United States were in a position to claim the rights of a *bona fide* purchaser to the state lands, the methods by which these lands were acquired from the States, and the lands in exchange therefor procured from the United States, would be none the less a fraud of which the latter might take advantage in a criminal prosecution. The indictment under section 5440 charges a conspiracy to defraud the United States out of the possession, use of and title thereto of divers large tracts of public lands, and if the title to these lands were obtained by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the state lands by setting up the rights of a *bona fide* purchaser. Under the circumstances it cannot be doubted that the United States might maintain a bill to cancel the patents to the exchanged lands procured by these fraudulent means, notwithstanding its title to the forest reserve lands might be good.

If the Government could procure cancellation of a patent thus issued by it when in the position of an innocent purchaser of the base lands, what excuse could there be for issuance of patent in a cause like this where it has present knowledge of practices which vitiate the title to the base lands? Under the circumstances, it is not only the privilege but it is the duty of the Government to reject the proffer of exchange.

The decision appealed from is accordingly affirmed.

## SANTA FE PACIFIC R. R. Co.

*Decided March 27, 1911.*

## PREFERENCE RIGHT OF CONTESTANT—NATIONAL FOREST LANDS—SECTION 2, ACT OF MARCH 3, 1911.

Section 2 of the act of March 3, 1911, protecting the preference rights of successful contestants where the lands embraced in the contested entries have been included in national forest withdrawals, applies to all contests initiated under the act of May 14, 1880, prior to the withdrawal, where cancellation of the entry results therefrom, regardless of whether cancellation was procured prior or subsequent to the withdrawal.

*PIERCE, First Assistant Secretary:*

The Santa Fe Pacific Railroad Company, by William H. Titus, attorney in fact, appealed from decision of the Commissioner of the General Land Office of December 22, 1910, rejecting its selection for E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 20, T. 22 N., R. 14 E., M. D. M., Susanville, California.

The land was embraced in former homestead entries of John H. Youles and John T. Youles, against which Titus filed contest affidavits November 24, 1909. With his contest affidavit Youles filed, as attorney in fact, applications of the railroad company for selections under act of June 4, 1897 (30 Stat., 36). December 2, 1909, the land was temporarily withdrawn for the Plumas National Forest, and is now embraced in said forest reservation. The homestead entries were not canceled, nor were the contests heard at the local office until February 20, 1910. The local office found in favor of contestant and recommended cancellation of the entries March 12, 1910, from which findings no appeal appears to have been rendered.

The applications for forest lieu selections were filed by the register of the local office, with notation: "Filed with contest against H. D. E. Susp. Held." The Commissioner rejected the selections for conflict with the forest reservation.

The appeal contends the selections should bear date as filed November 24, 1909, before withdrawal for forest reserve.

The decision appealed from was correct under the law when made. Neither selections nor entries can be made of land already segregated by a prior entry. (*Stewart v. Peterson*, 28 L. D., 515.) Though the selections may have been in custody of the local office, they were not on file, or entitled to be filed, nor did they give applicant any right, nor could he secure any right, until the former entry was canceled. The case is in the same condition in respect to this as it would be had Titus sought to make homestead entry. He could not make such entry because the land was segregated under the homestead entries against which his contests were then still pending. It is well settled under then subsisting law that reservation of land to public use defeats the preference right of a contestant. (*David A. Cameron*, 37 L. D., 450.)

But March 3, 1911, Congress passed an act (Public—No. 469), section two of which provides:

That in all cases where contests were initiated under the provisions of the act of May fourteenth, eighteen hundred and eighty, prior to the withdrawal of the land for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this act.

At the time of the withdrawal here in question Titus had not obtained cancellation of the Youles homestead entries and had not been to the expense of trail, but as the contests afterwards went forward to cancellation of such entries, it is held the successful contestant is entitled to exercise a preference right under that act. His contests were initiated under the act of May 14, 1880, prior to the withdrawal of the land for national forest purposes, and were successful in that the entries were subsequently canceled thereon. It is not deemed material that he had not at the date of the withdrawal procured cancellation, it being the manifest purpose of the act to protect all contests initiated prior to withdrawal, if cancellation of the entry resulted therefrom.

For this reason, the decision is vacated and the case remanded to the General Land Office for further proceedings appropriate thereto.

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**RECLAMATION—LOWER YELLOWSTONE PROJECT—PAYMENT.**

**ORDER.**

DEPARTMENT OF THE INTERIOR,

*Washington, March 27, 1911.*

On March 7, 1911, an order was issued for the Lower Yellowstone project, Montana-North Dakota, providing for a stay of proceedings looking to the cancellation of entries and water right applications under certain conditions. The said order is hereby rescinded, and the following is promulgated in lieu thereof:

1. Water right applicants who on or before April 30, 1911, comply with the provisions of existing public notices by making the necessary payments required thereunder on or before that date, shall be permitted to continue under the terms of the former public notices at a building charge of \$42.50 per acre.

2. That all entrymen and landowners who do not make the payments necessary to comply with existing public notices may have the time for payment of the first building charge extended to December 1, 1911, if payment be made on or before April 30, 1911, of operation and maintenance charges due. By making such payment the water user shall have the right to continue at the building charge of \$42.50 per acre under conditions to be hereafter announced.

3. Those who do not desire to avail themselves of the provisions hereinbefore stated, whether or not they have filed water right application, may receive water for the coming irrigation season upon the payment of 50 cents per acre for all the irrigable area in the farm unit held, on condition that on or before December 1, 1911, payment be made of an additional amount of \$1.00 per acre. The lands of those who take advantage of this condition are to be subject to the terms of a public notice to be hereafter issued providing for an increased building charge of \$53 to \$55 per acre.

4. In case of failure to proceed under one of the foregoing paragraphs, the entries or water right applications, or both, as the case may be, shall be promptly cancelled without further notice, where they have become subject to such action.

5. The lands of all land-owners who have not made water right application and who fail to make payment as herein provided, shall not receive water from the project, except subject to the conditions of a public notice to be hereafter issued which shall provide for such further increase in the building charge as may be necessary to repay the cost of building, operation, and maintenance of the project.

WALTER L. FISHER,  
*Secretary of the Interior.*

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#### RECLAMATION—OKANOGAN PROJECT—PAYMENT.

##### ORDER.

DEPARTMENT OF THE INTERIOR,  
*Washington, March 28, 1911.*

1. In pursuance of the act of Congress approved February 13, 1911 (Public—No. 353), entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section 4 of the Reclamation Act and for other purposes," the following order is hereby promulgated for the purpose of relieving the present situation under the Okanogan project, pending the issuance of public notice modifying or abrogating the notices heretofore issued.

2. A stay of proceedings looking to the cancellation of entries or water-right applications because of failure to make payment of the building charge will become effective as to all entries and water-right applications subject to the public notices and orders heretofore issued upon the payment on or before May 1, 1911, of \$1.00 per acre of irrigable land on account of the building charge, plus all charges for operation and maintenance which shall have become due on or before May 1, 1911, and subject also to compliance with the conditions of a public notice to be hereafter issued which will provide for an increased building charge of possibly \$68 or \$70 per acre to be deter-

mined after further investigation. Such stay of proceedings shall remain in effect until further announcement by means of a public notice or otherwise.

3. Upon failure to make payment as herein required on or before May 1, 1911, the entry or water-right application or both as the case may be, which would otherwise be subject to cancellation, will be promptly cancelled.

4. All applications for water rights filed under the provisions of notices heretofore issued and for which the payment necessary to avoid cancellation shall have been made on or before May 1, 1911, shall be continued in effect under such prior notices.

FRANK PIERCE,

*Acting Secretary of the Interior.*

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RECLAMATION—SUN RIVER PROJECT—PAYMENT.

ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, March 28, 1911.*

1. In pursuance of the act of Congress approved February 13, 1911 (Public-No. 353), entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section 4 of the Reclamation Act and for other purposes," the following order is promulgated for the purpose of relieving the present situation on the Fort Shaw unit, Sun River project, Montana, pending the issuance of public notice modifying or abrogating the notices heretofore issued.

2. Action looking to the cancellation of entries and water-right applications for failure to make payments when due shall be deferred until December 1, 1911, and water will be furnished in the irrigation season of 1911 in all cases where payment is made on or before April 30, 1911, of all operation and maintenance charges which have heretofore become due and remain unpaid.

WALTER L. FISHER,

*Secretary of the Interior.*

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ELIHU C. HARRISON.

*Decided March 29, 1911.*

UTE INDIAN LANDS—COAL WITHDRAWAL—UTE PREEMPTION DECLARATORY STATEMENT.

As the act of June 22, 1910, makes no provision for the initiation, after its passage, of any agricultural claims to lands withdrawn as coal, except

under the homestead and desert land laws and the reclamation and Carey acts, lands formerly within the Ute Indian reservation and withdrawn subject to the provisions of that act and the act of June 25, 1910, are not, so long as such reservation remains unrevoked, subject to appropriation by Ute pre-emption declaratory statement.

*PIERCE, First Assistant Secretary:*

This case comes before the Department on the appeal of Elihu C. Harrison from the decision of the Commissioner of the General Land Office of date November 25, 1910, holding for cancellation his Ute preemption declaratory statement for the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , and W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 14, T. 9 S., R. 95 W., Glenwood Springs, Colorado.

The facts in the case, so far as material to its disposition, are as follows:

The land involved is within the limits of the former Ute Indian Reservation, ceded to the United States by the treaty of March 2, 1868, and on July 7, 1910, was embraced in an Executive order of withdrawal for coal classification purposes. August 30, 1910, Harrison's preemption declaratory statement was tendered therefor, under the provisions of the act of September 4, 1841 (5 Stat., 456), and the act of June 15, 1880 (21 Stat., 199), settlement being alleged August 19, 1910. The local officers received and allowed the proffered filing on the date of its presentation, but stamped across the face thereof the words "Coal reserved to United States, Act March 3, 1909."

Upon considering the matter, the Commissioner, in the decision appealed from, held as follows:

You have stamped across the face of such declaratory statement "Coal reserved to United States, Act March 3, 1909," but the records of this office do not show any other reservation than the ones above mentioned. There appears, therefore, to be no authority for the use of the stamp in this case. . . .

The instructions in section 2, circular of September 8, 1910, relative to the act of June 22, 1910 (36 Stat., 683), states that said act "does not change, repeal or modify agreements or treaties made with Indian tribes for the disposition of their lands, or apply to lands ceded to the United States to be disposed of for the benefit of such tribes," and the claimant is not entitled to the benefits of the act of March 3, 1909 (35 Stat., 844), (See 38 L. D., 183), filing having been made subsequent to the withdrawal of July 7, mentioned. The declaratory statement is held for cancellation, subject to the right of appeal to the Department under the rules of practice.

The Executive order of July 7, 1910, withdrawing this land, recites that—

subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled, "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, and the act of Congress entitled, "An Act to provide for agricultural entries on coal lands," approved June 22, 1910, there is hereby with-

drawn from settlement, location, sale or entry, and reserved for classification and appraisal with respect to coal values all of those certain lands of the United States set forth and particularly described as follows: . . .

The act of June 25, 1910, *supra*, provides for the agricultural entry of lands withdrawn thereunder only in cases where, at the date of the withdrawal, a valid settlement had been made and was then being maintained and perfected pursuant to law. Harrison does not come within that provision, for the reason that the withdrawal under the act of the land in question preceded his settlement.

By section 1 of the act of June 22, 1910, *supra*, it is provided:

That from and after the passage of this act unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An Act to provide for an enlarged homestead:" *Provided*, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

The latter act makes no provision for the initiation, after its passage, of any agricultural claim to lands withdrawn as coal land, such as is that here in question, except under the homestead and desert land laws and the Reclamation and Carey Acts, and the limitations imposed respecting completion of title under homesteads permitted under this act clearly exclude any possibility of construing the term "homestead" as embracing preemption claims. The withdrawal, therefore, so long as it remains unrevoked, absolutely precludes appropriation or entry of these Ute lands under the preemption law, unless a claim was initiated prior to the approval of the act, in which event such claim can be perfected only under the proviso to section one thereof. Harrison alleges no claim prior to the withdrawal of the land, hence his filing, for that reason, and aside from any other consideration, was unlawfully allowed, and must be canceled.

For these reasons the judgment of the Commissioner is affirmed.



## UINTAH INDIAN LANDS—COMMUTATION OF HOMESTEAD ENTRIES.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., March 30, 1911.*

REGISTER AND RECEIVER,

*United States Land Office, Vernal, Utah.*

GENTLEMEN: I have to direct your attention to section 21 of the act of Congress approved March 3, 1911 (Public—No. 454), entitled—

An act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs . . . . for the fiscal year ending June 30, 1912.

Said section provides, among other things—

That any person who prior to March first, nineteen hundred and nine, made homestead entry for land in the Uintah Indian Reservation, in the State of Utah, under the act of May twenty-seventh, nineteen hundred and two, and acts supplementary thereto, and who has not abandoned the same, may make commutation proof therefor, provided such person has fully complied with the provisions of the homestead laws as to improvements, and has maintained an actual *bona fide* residence upon the land for a period of not less than eight months and upon payment thereof of one dollar and twenty-five cents per acre: *Provided further*, That nothing contained herein shall affect any valid adverse claim initiated prior to the passage of this act.

You will be governed by the provisions of the section above cited in all cases coming within the purview thereof.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

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JONES *v.* BURCH.

Motion for review of departmental decision of December 12, 1910, 39 L. D., 418, denied by First Assistant Secretary Pierce, March 31, 1911.

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NATIONAL FOREST WITHDRAWALS—HOMESTEAD ENTRIES—ACT OF MARCH 3, 1911.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

*Washington, March 31, 1911.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE,

SIR: The Department has considered your circular letter of March 23, 1911, addressed to registers and receivers of the United States

land offices, prepared for my approval, containing instructions under the act of March 3, 1911 (Public—No. 469), which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all homestead entries which have been canceled or relinquished, or are invalid solely because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, may be reinstated or allowed to remain intact, but in the case of entries heretofore canceled applications for reinstatement must be filed in the proper local land office prior to July first, nineteen hundred and twelve.

Sec. 2. That in all cases where contests were initiated under the provisions of the act of May fourteenth, eighteen hundred and eighty, prior to the withdrawal of the land for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this act.

The Department is of the opinion that when an application for the reinstatement of a canceled or relinquished entry is presented to the proper local land office, appropriate action should be promptly taken by the register and receiver, who should recommend either the allowance or the rejection, as the facts may warrant, and forward the papers to the General Land Office with a special letter in each case. This course of procedure is deemed advisable to the end that your office may be promptly advised respecting all such cases and for the further reason that no such entry should be reinstated except upon the approval of the General Land Office.

Registers and receivers should be instructed to require those who apply to make entry under section two of the act to show their qualifications at the time of their applications. It is also deemed well that the proper forest officers should be advised of all action taken under this act.

Your office is authorized to issue appropriate instructions in accordance herewith for the guidance of the registers and receivers of the several land offices.

Very respectfully,

WALTER L. FISHER, *Secretary.*

# INDEX.

## Absence, Leave of.

See *Reclamation; Residence.*

## Alaskan Lands.

See *Coal Lands; Mining Claims.*

Instructions of March 9, 1911, concerning Alaska surveys..... 553

Occupancy of land in the District of Alaska and survey thereof under the act of May 17, 1884, confer no such right against the United States as will prevent reservation thereof for its own uses..... 597

Rights initiated by survey of land and approval thereof by the surveyor-general preliminary to location of soldiers' additional rights in Alaska under the act of May 14, 1898, and regulations issued thereunder, are saved and protected by the proclamation including the lands within the limits of the Tongass national forest, so long as diligently prosecuted toward final entry..... 598

Under the provisions of the act of March 3, 1903, amending section 1 of the act of May 14, 1898, a soldiers' additional claim can not be located, along any navigable waters in the District of Alaska, within eighty rods of any claim theretofore located along such waters under any law whatever..... 513

Where the frontage meander line of a soldiers' additional claim in Alaska is projected along the shore of navigable waters for a distance of 160 rods for the boundary of such claim, the claim can not be further extended in the general direction of the shore, but must be cut off at that point and the remaining lines so located as to conform to the requirements of the statute which limit the frontage on the shore to 160 rods and provide for a reservation of 80 rods between locations; but such claim may be further extended in a cardinal direction, if not in the general direction of the shore, beyond the point where the claim departs from the shore line..... 513

## Appeal.

See *Practice.*

## Application.

One can not by two concurrent home-  
stead applications hold segregated double  
the quantity of land he is entitled to enter. 451

Rights under an application held sub-  
ject to the preference right of a successful

Page.

contestant, if not diligently asserted after  
expiration of the preference-right period,  
will be treated as abandoned in the face  
of an intervening adverse claim..... 498

## Arid Land.

See *Parks and Cemeteries.*

## Cemeteries.

See *Parks and Cemeteries.*

## Circulars and Instructions.

See *Table of*, page XVIII.

## Coal, Oil, and Gas Lands.

Instructions of June 12, 1909, amending  
regulations of April 10, 1909, governing  
classification and valuation of coal lands... 36

Instructions of August 8, 1910, respect-  
ing effect of withdrawal of coal lands for  
classification..... 156

Instructions of August 10, 1910, revok-  
ing circular of March 21, 1908, providing  
for notice of claim to withdrawn coal lands 157

Instructions of September 8, 1910, under  
act of June 22, 1910, relating to agricultural  
entries..... 179

Paragraph 2 of instructions of Septem-  
ber 8, 1910, amended by eliminating last  
sentence thereof..... 462, 473

Instructions of March 6, 1911, under acts  
of March 3, 1909, and June 22 and 25, 1910,  
relating to surface rights, withdrawals,  
etc..... 544

Lands valuable for coal, relinquished by  
the Santa Fe Pacific R. R. Co. in favor of  
small holding settlers, under the act of  
April 28, 1904, may be patented to such  
settlers, if qualified under the act, not-  
withstanding their coal character..... 135

The Santa Fe Pacific R. R. Co., upon  
relinquishing under the provisions of the  
act of April 28, 1904, lands valuable for  
coal, is entitled to select in lieu thereof coal  
lands equal in value to those relinquished. 135

The payment required by section 2 of  
the act of April 28, 1904, to be made by  
locators of Alaska coal lands, as a con-  
dition precedent to patent therefor, need not  
be made, in cases where protest is filed,  
until after the termination of the protest.. 322

The time covered by any form of pro-  
ceeding, including a field service report or  
protest, pursuant to instructions either of  
April 24, or May 16, 1907, during which

period final entry can not properly be allowed, should not be charged against an Alaska coal land applicant as a part of the six months' period prescribed by the instructions of June 27, 1908, for the submission of proof and the making of payment... 327

The act of June 25, 1910, authorizing temporary withdrawals of public lands for certain purposes, does not repeal or render ineffective the act of June 22, 1910, providing for agricultural entries of coal lands, or the act of March 3, 1909, providing for protection of the rights and the issuance of restricted surface patents to entrymen of lands subsequently classified, claimed, or reported as valuable for coal... 561

A withdrawal for coal classification under the act of June 25, 1910, does not defeat a pending application to locate a soldiers' additional right or bar applicant's right under the act of March 3, 1909, to take a surface patent for the land.... 561

A soldiers' additional application presented prior to the act of June 22, 1910, for land theretofore withdrawn by departmental order from filing or entry under the coal land laws, is within the proviso to the first section of the act of June 22, 1910, and applicant is entitled to carry the application to completion and receive the restricted patent provided for by that act, notwithstanding a subsequent executive withdrawal of the land for coal classification under the act of June 25, 1910..... 603

Indians to whom allotments have been made of lands withdrawn as coal lands within the additions to the Navajo Indian reservation in New Mexico, created by executive orders of November 9, 1907, and January 28, 1908, and whose allotments are known to embrace lands valuable for coal, are entitled to surface patents therefor under the provisions of the act of June 22, 1910..... 76

As the act of June 22, 1910, makes no provision for the initiation, after its passage, of any agricultural claims to lands withdrawn as coal, except under the homestead and desert land laws and the reclamation and Carey acts, lands formerly within the Ute Indian reservation and withdrawn subject to the provisions of that act and the act of June 25, 1910, are not, so long as such reservation remains unrevoked, subject to appropriation by Ute preemption declaratory statement... 614

No specific regulations relative to non-mineral applications for lands later withdrawn or classified as oil having been adopted by the Department, the procedure governing applications for lands subsequently classified or withdrawn as coal, adopted prior to the passage of the acts of March 3, 1909, and June 22, 1910, permitting the issuance of surface patents, should be followed in such cases, so far as

applicable; and in case of a protest by a mineral claimant against such nonmineral application, charging the mineral character of the land, the proceedings thereon should be in accordance with the Rules of Practice now in effect relative to contests..... 491

A statement by the surveyor that "a good quality of lignite coal is found in several places in the northern part of the township," but making no reference to any specific tracts, can not be regarded as a classification, as coal land, of any particular tract lying in the northern portion of the township, so as to affect the validity of a homestead entry therefor; and upon subsequent withdrawal of the land for coal classification, subject to the provisions of the act of June 22, 1910, the entryman is entitled, upon the submission of satisfactory proof, if he so elects, to receive a restricted patent under the act of March 3, 1909..... 337

## Confirmation.

### See *Indian Lands*.

The proviso to section 7 of the act of March 3, 1891, extends only to the classes of entries specifically mentioned therein, which require acts of the entryman to be performed on the ground and does not embrace soldiers' additional entries..... 93

## Contest.

Circular of August 4, 1910, relative to notation on records of local office..... 150

The right to initiate a contest against an entry, given by the act of May 14, 1880, should not be arbitrarily denied..... 340

The allowance of an application to contest a timber and stone entry is within the discretion of the Commissioner of the General Land Office, and not a matter of right granted by law; and where the applicant seeks to contest such an entry on the ground of underappraisement of the land, the Commissioner may, in his discretion, reject the application and direct a reappraisement..... 433

An affidavit of contest against the heirs of a deceased homestead entryman which charges only failure to reside upon the land is defective, and should include also a charge that the heirs have not cultivated the land..... 453

The charge in an affidavit of contest that the heirs of a deceased entryman have not "in any way improved" the land is equivalent to and constitutes a sufficient charge of failure to cultivate..... 453

An affidavit of contest against the heirs of a deceased entryman which fails to allege the death of the entryman and the date thereof is defective, but subject to amendment in that respect if objected to; but where hearing is had on the contest without objection on the ground of such

	Page.
omission and the evidence adduced establishes the fact and date of death of the entryman, objection on that ground will not thereafter be considered.....	453
A contest charging disqualification of an entryman having been dismissed after full disclosure of the facts upon which the charge was based, hearing will not be ordered upon a second contest making the same charge.....	418
A junior contestant alleging a sufficient ground of contest against the entry and also charging the fraudulent character of the senior contest, may, upon due notice to the respective parties, intervene in the proceedings on the senior contest, for the purpose both of sustaining his own charge against the entry and also his charge against the senior contest.....	340
An application to contest an entry upon which final certificate has not issued, filed pending proceedings by the Government on the report of a special agent, should be received and held subject to final determination of such proceedings; and should the government proceedings fail, the contestant is entitled to proceed against the entry as of the date his application was filed.....	102
Where after an adverse report by a special agent, but prior to direction to the register and receiver to issue notice thereon, as provided by paragraph 3 of instructions of November 25, 1907, a sufficient affidavit of contest is filed against the entry, the land department may, in its discretion, in the absence of any evidence of collusion between the proposed contestant and the contestee, suspend the government proceedings pending termination of the private contest.....	102
<b>Contestant.</b>	
Regulations of September 15, 1910, respecting rights of junior and senior contestants in case of relinquishment....	217
The preference right of entry of a successful contestant is not transferable.....	449
No preference right of entry accrues as result of a contest until final judgment of cancellation has been rendered; and in exercise of such right the contestant is bound by the regulations in force at the time his application is filed.....	449
Notice of the cancellation of an entry under contest and of contestant's preference right of entry, addressed to contestant but sent through his attorney, is not notice to contestant until actually received by him, and the thirty-day period within which he may exercise his preference right does not begin to run until the notice has been so received.....	160
Direction given that all notices advising contestants of the cancellation of the contested entries and of their right to apply	

to make entry of the land in virtue of the preference right accorded by the statute shall be sent to contestant personally at his address of record.....	160
The powers and authority of an attorney at law representing the contestant in a contest proceeding end with the judgment of cancellation; and notice of such cancellation and of contestant's preference right of entry should be given to contestant personally and not to the attorney.....	225
Section 2 of the act of March 3, 1911, protecting the preference rights of successful contestants where the lands embraced in the contested entries have been included in national forest withdrawals, applies to all contests initiated under the act of May 14, 1880, prior to the withdrawal, where cancellation of the entry results therefrom, regardless of whether cancellation was procured prior or subsequent to the withdrawal.....	611
While a homesteader whose entry is canceled as result of a contest can not by settlement and application to make second homestead entry of the land defeat the preference right of the successful contestant, yet where the contestant has transferred all his right and interest in the land, the right of the entryman under his settlement and application is superior to and will defeat an attempted location of soldiers' additional right in the name of the contestant but in fact in the interest and for the benefit of the transferee.....	465
Where a sufficient affidavit of contest has been filed, entry upon relinquishment of the entry under attack will not be allowed to any person other than the contestant until contestant shall have been duly notified of the filing of the relinquishment and given opportunity during the preferred-right period of thirty days to appear and offer proof that the entryman or some person or persons in privity with him in fact knew of the filing of such affidavit of contest, and that the relinquishment was induced thereby, and upon satisfactory proof that the relinquishment was the result of the contest contestant will be entitled to the usual preference right of entry.....	165
<b>Corporation.</b>	
A corporation in acquiring title under the public-land laws must be regarded as an entity, with no greater right than an individual.....	460
<b>Desert Land.</b>	
General desert-land circular of September 30, 1910.....	253
Instructions of February 28, 1911, under act of February 3, 1911, relating to second desert entries.....	524

Where a desert entryman could not at date of entry, because of an existing withdrawal covering part of the land desired by him, embrace in his entry the full area allowed by law, he may, upon restoration of the withdrawn lands, be permitted to enlarge his entry to conform to his original intention..... 48

Payment by a desert-land entryman to cover his proportionate share of the cost of construction and maintenance of irrigation works by means of which his land is proposed to be irrigated is a proper basis for annual proof..... 127

While annual proof submitted upon a desert-land entry, showing expenditures for construction and maintenance charges on irrigation works by means of which the land is proposed to be irrigated, can not, in a contest proceeding against the entry on the ground of failure to make the required expenditures, be considered as substantive proof of such claimed expenditures, it is nevertheless notice to the world of the amount and character of the expenditure claimed, and it is incumbent on the contestant to challenge and disprove such claimed expenditure..... 127

Where cultivation of one-eighth of the area of a desert-land entry covering a smallest legal subdivision is rendered impossible by reason of physical conditions on the ground, proof showing that the entryman has cultivated all the area susceptible of cultivation may be accepted and the entry submitted to the board of equitable adjudication..... 283

A certificate of stock in a water company which under the by-laws of the company is limited, under penalty, to location and use upon a certain designated twenty-acre tract, can not be accepted toward meeting the requirements of the desert-land act with respect to water rights as to another and different twenty-acre tract embraced in the same entry, notwithstanding the amount of water to which the entryman is entitled under the stock may be more than sufficient to irrigate the twenty acres to which it is appurtenant..... 285

The construction of an artesian well, with a view to procure water for the reclamation of a desert land entry, is a construction of irrigating works within contemplation of section 3 of the act of March 28, 1908, and failure, after diligent effort, to obtain water by means of such attempted artesian well, without fault on the part of the entryman, is sufficient ground for extension of time as provided by that section..... 475

The filing of a contest against a desert-land entry during the pendency of an application for extension of time under the act of March 28, 1908, will not prevent the

allowance of such application where the contest affidavit does not charge facts tending to overcome the *prima facie* showing of right to the extension set forth in the application..... 558

The right to an extension of time within which to submit final proof upon a desert-land entry, accorded by the act of March 28, 1908, is fixed by the act itself, upon a proper showing of facts bringing a case within its provisions, and is not a mere privilege resting in discretion of the Commissioner to allow or deny; his discretion under the act being limited to fixing the time or period of the extension..... 558

## Entry.

See *Desert Land; Homestead.*

## Equitable Adjudication.

See *Desert Land.*

Amended rules adopted October 17, 1910..... 320

## Fees.

Instructions of March 11, 1911, under act of March 4, 1911, authorizing refund to registers of cancellation-notice fees..... 556

## Final Proof.

Final five-year proof upon a homestead entry, found insufficient, may be accepted as commutation proof, upon proper payment, if a sufficient period of residence, substantially continuous, be shown next preceding the submission of the proof; provided the entryman was during such period a qualified homesteader..... 418

## Forest Land.

See *Reservation*, sub-title *Forest*.

## Gas Lands.

See *Coal, Oil, and Gas Lands.*

## Homestead.

See *Reservation*, sub-title *Forest*.

### GENERALLY.

Revised suggestions to homesteaders, September 24, 1910..... 232

Instructions of August 18, 1910, revoking circular of September 9, 1874, providing for notice to homestead entrymen of expiration of five years..... 159

Under the provision of the homestead law which confers upon the widow of a deceased entryman the right to complete the entry, the wife of an entryman sentenced to the penitentiary for life is entitled to perfect the entry in like manner as if the entryman were actually dead... 151

Under the maxim *de minimis non curat lex*, the ownership of less than one acre in excess of 160 acres, will not be held a disqualification to make homestead entry... 131

One holding the fee subject to an ease-

	Page.
ment for public road is not the proprietor of the area covered by the easement within the meaning of section 2289, Revised Statutes, and such area should be excluded in determining his qualifications to make homestead entry under that section.....	189
Where at the time of making homestead entry the entryman was disqualified by reason of being the proprietor of more than 160 acres of land, but acted in good faith, believing himself qualified, and prior to the intervention of any adverse right or proceeding against the entry the disqualification is removed, the entry may be permitted to stand and considered effective from the date he became qualified.....	418
<b>ENTRY.</b>	
<i>Original.</i>	
Entries under section 2289, R. S., must be made in conformity to legal subdivisions; and where a forty-acre subdivision has been rendered fractional, the remaining area may be appropriated under that section only as an entirety.....	365
A single woman who applies to make homestead entry through an officer authorized to take the preliminary affidavit, and marries prior to receipt of the application at the local office, is not qualified to make the entry.....	363
Mere acts of settlement, without residence, performed by a single woman who subsequently marries prior to the allowance of entry upon her application for the land, do not bring her within the provisions of the act of June 6, 1900, and she is not entitled to carry the entry to completion.....	363
<i>Second.</i>	
Instructions of February 28, 1911, under act of February 3, 1911, relating to second homestead entries.....	524
The relinquishment of a homestead entry in good faith, to avoid controversy with an adverse claim of prior right believed or reasonably apprehended to be superior, is in effect a confession of judgment, of cancellation for conflict, and not such a relinquishment as contemplated by the act of February 8, 1908, and is no bar to a second entry.....	219
<b>WIDOW; HEIRS; DEVISEE.</b>	
See <i>Commutation.</i>	
Where a settler upon unsurveyed land dies prior to survey, after having resided upon and cultivated the land for five years and therefore become entitled, upon making entry and final proof, to a patent, and his widow, after his death, continues to assert the right, she is entitled, upon filing of the plat of survey, to make entry and proof and complete title to the land.....	279
A will, in so far as it attempts to pass any interest in a homestead entry before	

	Page.
the completion of title by compliance with the homestead law, is inoperative as against those upon whom the law devolves the right to the entry; and no possession under such a will can be pleaded in excuse of failure to comply with the law by those upon whom the law devolves the right to the entry.....	362
<b>ADJOINING FARM.</b>	
Only such lands are available as basis for an adjoining farm entry as at the date of such entry occupy such a status that they might, if vacant on the records of the local office, be included in the entry; they being regarded, for administrative purposes, as constituting a part of the area so entered.....	365
A town lot, or land appropriated to urban uses, can not be made the basis for an adjoining farm entry.....	365
<b>SOLDIERS'.</b>	
Circular of October 11, 1910, defining soldiers' and sailors' homestead rights....	291
<b>SOLDIERS' ADDITIONAL.</b>	
The rule of approximation must be strictly observed in the location of soldiers' additional rights, and it will not be extended by permitting application of the principle <i>de minimis non curat lex</i> to bring a claim with the rule.....	550
A soldiers' additional right attaches only from the date of the application to locate the same, and prior occupancy and improvement of land can not avail as the initiation of a claim under an application to locate a soldiers' additional right.....	597
An application to locate a soldiers' additional right does not preclude the filing of an adverse application to enter the same land, subject to determination of the validity of the additional right; and in case the additional right be found invalid, the intervening adverse application attaches and bars substitution of another right in lieu of the one held invalid.....	208
The right of additional entry conferred by the act of June 8, 1872 (now section 2307, R. S.), upon the widow of a soldier who made homestead entry for less than 160 acres, is lost to the widow if not appropriated during widowhood; and after remarriage, the widow's only interest in such right, if any, is as heir of the soldier....	108
Where the widow of a soldier made homestead entry in her own right for less than 160 acres and died prior to enactment of the Revised Statutes, the right of additional entry authorized by sections 2306 and 2307, R. S., became, upon such enactment, an asset of her estate, subject to assignment by her heirs, or to distribution, as other personal property....	442
Upon the location of any portion of a certificate of soldiers' additional right,	

	Page.		Page.
notation to that effect should be promptly made upon the original certificate, and certificates thus located in part should not be thereafter returned to those entitled to the unused portion, but the owners, if they so desire, may secure, in accordance with law, certified copies of such certificates with the memoranda entered thereon, and in this manner obtain evidence of the outstanding portion of the rights involved.....	133	of May 1, 1888, "to the operation of the laws regulating homestead entry, except section 2301 of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain," are subject to appropriation under section 2306 of the Revised Statutes by location of soldiers' additional right.....	561
Where one claiming as assignee of a soldiers' additional right is advised by the land department that his claim will be recognized and location of the right allowed upon the evidence of ownership then on file, the subsequent allowance of a location based upon the same right, by another not claiming in privacy, in the face of such assurance and without notice to claimant, will not prevent the Department from recognizing the right of claimant to make location under the right....	211	<b>COMMUTATION.</b>	
Where one claiming ownership of a soldier's additional right by virtue of purchase thereof at a sale by the administrator of the estate of the deceased soldier under probate proceedings locates the same, and another files protest against issuance of patent upon such location, claiming ownership of the right in himself through an alleged sale of the right by the soldier prior to his death, and furnishes evidence persuasive but not conclusive of his ownership, the Department will not issue patent upon the location until the protestant has been afforded opportunity to proceed directly in the court which granted letters of administration upon the soldier's estate and ordered sale of the right, with a view to having such proceedings set aside, or to furnish clear and convincing proof of the soldier's sale of the right prior to his death.....	194	Commutation is allowed only upon a showing of substantially continuous personal presence upon the land for a period of fourteen months next preceding submission of proof; and residence prior to a period of absence under leave of absence granted the entrymen can not be added to residence subsequent to that period to make up the necessary fourteen months. (See 39 L. D., 360.).....	72
A withdrawal for coal classification under the act of June 25, 1910, does not defeat a pending application to locate a soldiers' additional right or bar applicant's right under the act of March 3, 1909, to take a surface patent for the land..	561	Two periods of <i>bona fide</i> residence, separated by a leave of absence regularly procured, without fraud, may be added together to make up the necessary fourteen months as a basis for commutation.....	360
A soldiers' additional application presented prior to the act of June 22, 1910, for land theretofore withdrawn by departmental order from filing or entry under the coal land laws, is within the proviso to the first section of the act of June 22, 1910, and applicant is entitled to carry the application to completion and receive the restricted patent provided for by that act, notwithstanding a subsequent executive withdrawal of the land for coal classification under the act of June 25, 1910.....	603	Absence under leave granted in accordance with the provisions of the act of March 2, 1889, will not be considered residence toward making up the period of eight months required by section 9 of the act of May 29, 1908.....	72
Lands in the former Gros Ventre, Piegan, Blood, Blackfeet and River Crow Indian reservation, opened under the act		The widow of a deceased homesteader who had complied with law up to the time of his death is entitled to commute her husband's entry upon showing both residence and cultivation, immediately succeeding his death, for a period which, added to the time of his compliance with law, will amount to fourteen months' residence and cultivation, provided proof be seasonably made.....	224
		<b>KINKAID ACT.</b>	
		Circular of June 7, 1910, governing entries under Kinkaid Act.....	18
		With respect to the question of compactness, an entryman under the Kinkaid Act is entitled to take any legal subdivision of public land he desires and then fill out or complete his entry by the selection of other lands in addition thereto so as to make the entire entry in a form as compact as possible, considering the status of the surrounding lands.....	1
		The fact that the owner of an original homestead has mortgaged the same does not disqualify him to make additional entry under section 2 of the act of April 28, 1904, as amended by section 7 of the act of May 29, 1908, where under the law of the State a mortgage does not divest the mortgagor of title or right of possession.....	16
		The term "own and occupy" in said sections, defining persons qualified to	



	Page.
make additional entry thereunder, implies that the occupancy must be one of right as owner and that the ownership and occupancy of the original homestead shall continue for the full period of five years from date of the additional entry.....	16
Where an entryman under the Kinkaid Act at the time of making application to enter gave notice of his intention to embrace other adjoining land by amendment as soon as the record could be cleared of an existing entry covering the same, the fact that such adjoining land became subject to entry as the result of the contest of another, and not of the entryman himself, is no reason for denying his application to embrace the same by amendment.....	420

# ENLARGED HOMESTEAD.

Instructions of July 18, 1910, under act of June 17, 1910, relating to enlarged homesteads in Idaho.....	96
--	----

Instructions of August 24, 1910, relative to qualifications to make additional entry under section 3 of the enlarged homestead act.....	164
---	-----

The widow of a deceased homestead entryman has the same right to enlarge the original entry of her deceased husband, by an additional entry under section 3 of the act of February 19, 1909, as he himself would have if living, provided she continues to maintain residence upon the original entry.....	346
--	-----

One who makes additional entry for less than the area he is entitled to take under section 3 of the enlarged homestead act of February 19, 1909, may be permitted to enlarge his entry, where it is clearly shown that he did not thereby intend to exhaust his right and took prompt action looking to amendment of the entry by the addition of adjoining land.....	36
---	----

The right to make additional entry under section 3 of the enlarged homestead act of February 19, 1909, is determined by conditions existing at the time the right is attempted to be exercised and not at the date of the classification and designation of the land under that act; and where one qualified to make such entry at the time of the classification and designation of the land thereafter submits final proof upon his original entry, he thereby disqualifies himself to make entry under that section.	206
---	-----

Directions given for the amendment of paragraph 5 of the circular of December 14, 1909, 38 L. D., 361, and the circular of July 18, 1910, 39 L. D., 96, to accord with the views herein expressed.....	206
--	-----

There is no authority for establishing a fixed and arbitrary limit, to be measured either by distance or time, from land entered under section 6 of the enlarged homestead act, within which the entryman must reside; if he successfully farms

	Page.
the land, in person or under his personal supervision, he meets the requirements of the statute.....	168

Lands within a national forest listed under the act of June 11, 1906, as subject to homestead entry, may be appropriated only under that act; and the fact that they are also embraced within a larger area designated as of the class subject to entry under the enlarged homestead act of February 19, 1909, does not render them subject to disposition under said act.....	604
--	-----

A designation or classification of lands under the enlarged homestead act is not necessarily conclusive; but an entry made on the strength of such designation should not be canceled in the absence of a showing of bad faith, fraud, or failure to comply with law—especially in the absence of a clear and definite showing that the land is "susceptible of successful irrigation at a reasonable cost from any known source of water supply".....	33
--	----

# Indemnity.

See *Railroad Grant; School Land.*

# Indian Lands.

Instructions of March 3, 1911, under act of February 16, 1911, relating to Red Lake lands.....	540
--	-----

Instructions of July 9, 1910, governing sale of unentered Utah lands.....	79
---	----

Instructions of March 30, 1911, under section 21, act of March 3, 1911, relating to commutation of homestead entries of Utah lands.....	617
---	-----

No deduction in acreage or payments will be made in entries of Fond du Lac Indian lands traversed by the Northern Pacific Railroad Company's right of way because of the area embraced in such right of way.....	565
--	-----

Surplus lands in the Spokane Indian reservation classified as timber lands under the provisions of section 2 of the act of May 29, 1908, are not subject to location and entry under the mining laws.	172
---	-----

The provisions of the act of June 22, 1910, are applicable and operative upon the coal lands, or those lands withdrawn or classified as coal, and otherwise unreserved, situated within the former Southern Ute Indian reservation.....	462
---	-----

As the act of June 22, 1910, makes no provision for the initiation, after its passage, of any agricultural claims to lands withdrawn as coal, except under the homestead and desert land laws and the reclamation and Carey acts, lands formerly within the Ute Indian reservation and withdrawn subject to the provisions of that act and the act of June 25, 1910, are not, so long as such reservation remains unrevoked, subject to appropriation by Ute preemption declaratory statement....	614
---	-----

In case a Turtle Mountain Indian made homestead entry of public land either prior or subsequent to ratification by the act of April 21, 1904, of the agreement with the Turtle Mountain band of Chippewa Indians, said entry will be held and treated as a selection under said agreement and to exhaust his rights thereunder..... 508

The protest of Special Agent Hobbs, in his letter of November 11, 1903, challenging the validity of certain homestead entries in the former Siletz Indian reservation, being within two years after the issuance of final certificates upon such entries, takes the entries out of the operation of the proviso to section 7 of the act of March 3, 1891..... 437

Commutation of a homestead entry of lands within that portion of the Red Lake Indian reservation opened under the provisions of the act of February 20, 1904, may be allowed upon a showing that the entryman established actual residence within six months from the date of entry; that such residence was maintained for such period as added to the period intervening between the date of entry and the establishment of residence equals a period of fourteen months; and that he was actually residing upon the land at the time of submitting such proof..... 456

Lands in the former Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian reservation, opened under the act of May 1, 1888, "to the operation of the laws regulating homestead entry, except section 2301 of the Revised Statutes, and to entry under the town-site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain," are subject to appropriation under section 2306 of the Revised Statutes by location of soldiers' additional right..... 561

Lands in the Devils Lake Indian reservation, opened to entry under the act of April 27, 1904, at \$4.50 per acre, which at the date of the proclamation of June 8, 1907, reducing the price of the remainder of said lands then unreserved and undisposed of to \$2.50 per acre, were embraced in an Indian allotment of record, or were in a state of reservation by virtue of the act of April 23, 1904, reserving lands for a period of sixty days after cancellation of an allotment covering the same, did not fall within the purview of the proclamation; and a subsequent entryman of the land was properly required to pay at the original rate of \$4.50 per acre, and is not entitled to repayment of the difference between the two rates as excess..... 434

Page.

**Irrigation.**See *Reclamation*.

Page.

**Island.**

Upon the admission of a State into the Union it acquires absolute property in and dominion and sovereignty over all soils under the navigable waters within its borders; but islands therein formed prior to admission of the State remain the property of the United States, subject to disposal as other public lands..... 566

The United States has authority to survey and dispose of an island lying between the meander line and the thread of a stream, navigable or nonnavigable, omitted from survey at the time the public land surveys were extended over the township, where it clearly appears that at the time of the township survey the island was a well-defined body of public land left unsurveyed..... 566

**Isolated Tract.**

Circulars of June 6 and 7, 1910, governing sale of isolated tracts..... 10, 22

**Land Department.**

A United States mineral surveyor's appointment is for no fixed period, and where made "during the pleasure of the surveyor-general for the time being" is not terminated by failure to renew bond at the expiration of four years, as required by the act of March 2, 1895..... 177

A forest lien selection under the act of June 4, 1897, by a United States mineral surveyor is in violation of section 452, Revised Statutes, which prohibits persons connected with the public-land service from directly or indirectly purchasing or becoming interested in the purchase of public lands..... 177

**Mineral Lands.**

Instructions of July 26, 1910, governing classification of mineral lands..... 113, 116

The return of the surveyor general as to the character of land constitutes but a small element of consideration when the question of the true character of the land is at issue..... 491

Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes..... 310

# Mining Claim.

## GENERALLY.

As a general rule final certificate and patent for a mining claim should issue to the applicant in whose name the patent proceedings were initiated and prosecuted; and in event of his death certificate and patent should nevertheless issue in his name, and not to his heirs..... 574

The position of conflicting mining claims, and their positions with relation to each other, must be determined as the claims are defined and established on the ground, and all errors of description of the position of any of the claims, and of conflicts among them, must give way thereto. 546

Where there has been a severance of a mining claim, entry may be allowed and patent issued on the part of the claim within which discovery was made, and as to which all the requirements of the mining laws have been met; without regard to the remainder of the claim..... 523

Where as result of an adverse proceeding a portion of a conflict area is excluded in favor of the adverse claimant, proper amendment should be made and certified by the surveyor general upon the official plat and in the field notes of survey of the claim, made necessary by the judgment, so that the boundaries and areas of both that portion of the claim entered and that so excluded shall be definitely shown and described..... 353

While an applicant for patent for a mining claim must diligently prosecute the patent proceedings to completion, yet where the local officers, upon a showing deemed by them sufficient, have in fact allowed entry although not within the calendar year in which the publication of notice of the application was completed, and there is no intervening adverse claim, the entry should not be canceled upon the protest of one alleging relocation of the land subsequent to allowance of the entry..... 574

## RELOCATION.

A relocation of a mining claim subsequent to the allowance of entry does not constitute an intervening adverse right, and upon rejection of a protest by the relocater against the entry he is not entitled as a matter of right to appeal from such action, being a protestant without interest..... 574

## ADVERSE CLAIMS.

Circular of June 25, 1910, under act of June 7, 1910, with respect to extension of time for filing adverse claims in Alaska... 49

## DISCOVERY.

Discovery of mineral is an essential prerequisite to initiation of title under the mining laws..... 460

Page.

Page.

The disclosure of a stratum of bituminous sandstone or shale from which a small quantity of oil seeps, not sufficient to impress the land with any value for mining purposes, does not constitute a sufficient discovery to support a valid mining location..... 335

A placer location of oil lands for 160 acres, made by eight persons and subsequently transferred to a single individual, invalid because not preceded by discovery, can not be perfected by the transferee upon a subsequent discovery to the full area so located, but only as to twenty acres thereof..... 460

While discovery of mineral subsequent to location of a mining claim is sometimes held by the land department to relate back to the date of location, where there was no precedent discovery, the doctrine of relation can not be invoked to the disadvantage of intervening adverse claims nor to permit anyone to secure more land by indirect means than may be done directly..... 460

A single discovery of mineral sufficient to authorize the location of a placer claim does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land is open to investigation and determination by the land department at any time until patent has issued. 299

## PLACER.

In determining the character of land embraced in a placer location, ten-acre tracts, normally in square form, are the units of investigation and determination; and if any such area is found to be non-mineral it should be eliminated from the claim..... 299

## National Forests.

See *Reservation*.

## National Parks.

See *Parks and Cemeteries*.

## Notice.

See *Forest Reserves; Practice*.

## Oil Lands.

See *Coal, Oil, and Gas Lands*.

## Oklahoma Lands.

In making proof under section 24 of the act of May 29, 1908, on homestead entries of pasture reserve lands in the former Kiowa, Comanche, and Apache Indian reservations, opened under the provisions of the act of June 5, 1906, credit for constructive residence may be allowed, not exceeding six months, between the date of entry and date of establishment of residence, and the remainder of the ten months' period of residence fixed by said

	Page.		Page.
section need be only of the character exacted in cases of five-year proof—that is, it need not necessarily be strictly continuous.....	468	separate, independent, and distinct from the others, brings the record up only for determination of the rights of the appellant upon the issues presented by the appeal; and parties adversely affected by the decision who fail to appeal within the time prescribed by the Rules of Practice can not, as a matter of right, insist upon further recognition of their claims, upon consideration of the case on the appeal, but by such failure to appeal are deemed to have acquiesced in the decision and their claims will be considered as eliminated from the controversy.....	498
<b>Parks and Cemeteries.</b>		<b>HEARING.</b>	
Instructions of July 6, 1910, under act of May 11, 1910, creating Glacier National Park.....	67	Failure of the Government by reason of some unforeseen emergency, to have a representative present at the time and place fixed for hearing upon a special agent's report against an entry is no bar to a second order for a hearing to determine the true facts with respect to the entry under investigation.....	72
Instructions of January 10, 1911, relative to mineral or agricultural claims within national parks.....	442	<b>NOTICE.</b>	
Regulations of October 25, 1910, under act of June 7, 1910, granting lands to certain towns in Colorado.....	316	Service of notice of a contest by leaving a copy with the husband of contestee is insufficient and confers no jurisdiction....	60
Land actually in use as a public cemetery is not "vacant" within the meaning of the act of June 4, 1897, and is not subject to selection under that act.....	383	Service of notice of a contest on Sunday is invalid and no jurisdiction is thereby acquired.....	60
<b>Power Sites.</b>		Directions given that publication of notices of restoration to settlement and entry of lands temporarily withdrawn with a view to possible inclusion in a national forest be reduced to a period of four successive weeks.....	386
See <i>Right of Way</i> .		Notice of the cancellation of an entry under contest and of contestant's preference right of entry, addressed to contestant but sent through his attorney, is not notice to contestant until actually received by him, and the thirty-day period within which he may exercise his preference right does not begin to run until the notice has been so received.....	160
<b>Practice.</b>		Direction given that all notices advising contestants of the cancellation of the contested entries and of their right to apply to make entry of the land in virtue of the preference right accorded by the statute shall be sent to contestant personally at his address of record.....	160
See <i>Rules cited and construed</i> , page XXII.		The powers and authority of an attorney at law representing the contestant in a contest proceeding end with the judgment of cancellation; and notice of such cancellation and of contestant's preference right of entry should be given to contestant personally and not to the attorney.....	225
<b>GENERALLY.</b>		<b>Price of Land.</b>	
Revised rules of December 9, 1910.....	395	See <i>Indian Land</i> .	
Rule 10 of revised rules amended.....	552	<b>Protest.</b>	
The land department has the power to fully investigate any application for title to public land, and an order by the Commissioner directing such investigation is ordinarily not appealable, and copy thereof should not be furnished to counsel for applicant.....	426	Circular of August 4, 1910, relative to notation on records of local office.....	160
While long delay in the adjudication of claims under the public-land laws should be avoided, it is more important that the land department be fully satisfied of the entire legality of the transaction, and an investigation ordered by the Commissioner for that purpose will not be interfered with by the Secretary.....	427		
<b>APPEAL.</b>			
Where a railroad selection list covering lands embraced in homestead settlement claims was rejected because of such conflicts, and the company appealed generally from that action, without specifying within the time fixed by the Rules of Practice the particular entries it desired to contest, and with intent to prosecute its appeal only as to lands which might subsequently be relieved of conflicting claims, the Department will not recognize the appeal as saving any rights in the company, as against a subsequent reservation for forest purposes, in event of cancellation of the conflicting settlement claims as to any of the tracts involved.....	444		
An appeal by one of the parties adversely affected by a decision of the Commissioner in a case where the interest of each of the several parties to the controversy is			

**Public Land.**

Instructions of July 23, 1910, under act of June 25, 1910, authorizing patents to equitable claimants to certain lands in Wisconsin..... 111

**Railroad Grant.**

See *Railroad Land; Right of Way.*

**INDEMNITY.**

Lands classified as coal lands may be disposed of only under the coal-land laws, and are not subject to indemnity selection by the Northern Pacific Railway Company under the act of July 2, 1864, in lieu of mineral lands lost to the company's grant..... 314

*Query:* Are unclassified coal lands "agricultural lands" within the meaning of the act of July 2, 1864, and subject to indemnity selection on account of mineral losses..... 314

**SELECTION.**

The railway company having filed supplemental lists of selections after the filing of the township plat and within the time allowed by law, adjusting its selections to the lines of survey, settlement claims initiated subsequent to the filing of such lists will be rejected, and entries inadvertently allowed subsequent to that date canceled; while entries allowed and settlement claims by qualified homesteaders initiated prior to that time will be accorded priority over the company's selections, if since maintained by compliance with law..... 533

**LANDS EXCEPTED.**

Lands within the primary limits of the grant to the Atlantic and Pacific, now Santa Fe Pacific Railway Company, by the act of July 27, 1866, and also within the claimed limits of the Laguna Pueblo private land grant, being *sub judice* at the date of the grant to the railway company, are by force of the act of July 22, 1854, excepted from the operation of that grant... 424

Where a tract of unsurveyed land within the primary limits of a railroad grant was at date of definite location of the road in good faith occupied by a qualified homestead settler, and by conveyance and connected and continuous occupancy the right passed from one settler to another down to date of filing the township plat of survey, the rights of the settler are superior to claim of the company under its grant..... 5

**MINERAL LANDS.**

An adjudication by the Land Department that a tract of land within a railroad grant is mineral in character is not effective to except it from the grant in the face of a subsequent adjudication, as result of a hearing that the tract is not and never was mineral in character; and having passed to the company under the grant, the

Page.

Land Department is without authority to make other disposition thereof..... 169

An adjudication by the Land Department, in a proceeding in which that question is in issue, that lands within the primary limits of a railroad grant were at the date of the grant mineral in character, so long as it stands unimpeached, excepts them from the operation of the grant; and no rights attach thereto under the grant upon a subsequent adjudication by that department, in another proceeding, that the lands in question are at that time nonmineral..... 288

**ACT OF JUNE 22, 1874.**

Neither the act of June 22, 1874, nor the amendatory act of August 29, 1890, authorizes relinquishment by a railroad company, with a view to selection of other lands, in favor of one who has no entry or filing of record or who has not resided upon and improved the land for five years..... 69

**ADJUSTMENT.**

A valid selection by the Northern Pacific Railway Company under the act of July 1, 1898, subsisting at the date of the proclamation establishing the Coeur d'Alene National Forest, excepts the land covered thereby from the operation of the proclamation..... 343

Where the Northern Pacific Railway Company declines to relinquish a tract under the act of July 1, 1898, in favor of a claimed settlement right, on the ground that it has sold or contracted to sell the land, the settler is entitled, where the records of the county in which the land lies do not evidence such sale or contract, to take issue upon the allegation of sale and to have a hearing to ascertain whether such sale or contract has in fact been made..... 389

Where part of the land selected by an individual claimant under the provisions of the act of July 1, 1898, as extended by the act of May 17, 1906, in lieu of a completed claim, is relinquished by claimant to avoid conflict with a prior right, he may be permitted to make supplemental selection of an equal amount of land, which need not be contiguous to nor in the same land district as the land embraced in the original selection..... 318

**Railroad Lands.**

Lands valuable for coal, relinquished by the Santa Fe Pacific R. R. Co. in favor of small holding settlers, under the act of April 28, 1904, may be patented to such settlers, if qualified under the act, notwithstanding their coal character..... 125

The Santa Fe Pacific R. R. Co., upon relinquishing under the provisions of the act of April 28, 1904, lands valuable for coal, is entitled to select in lieu thereof

	Page.		Page.
coal lands equal in value to those relinquished.....	135	right of further appeal to the Secretary of the Interior.....	2
The joint resolution of June 25, 1910, construing section 6 of the act of May 29, 1908, does not have the effect to validate an entry made under that section in the interest of a transferee and in furtherance of an attempted transfer of the right of the settler prior to the acquirement of a vendible interest by him.....	221	The first instalment of building charges against lands held in private ownership within the Truckee-Carson reclamation project was due and payable December 1, 1907, notwithstanding application for water right was not filed until after the close of the irrigation season of that year..	571
The act of April 19, 1904, section 6 of the act of May 29, 1908, and the joint resolution of June 25, 1910, providing for the relief of certain homestead settlers within conflicting railroad grants in the State of Wisconsin, do not authorize such settlers to exchange the lands entered by them in Wisconsin for other public lands, or grant a scrip right, but contemplate merely that in making homestead entries of other lands the entrymen shall be entitled to credit for the time spent and improvements made on the Wisconsin lands.....	304	Temporary leases for grazing and other agricultural purposes may be made of lands acquired through condemnation proceedings for reservoir or canal purposes in reclamation projects during such periods as may elapse between the acquisition of title and the actual use of the same for reservoirs and canals.....	525
<b>Reclamation.</b>		All such leases should state the purpose for which the lands were acquired and that such purpose will not in any manner be interfered with or delayed by the lease; should specifically provide for the immediate, or speedy, termination of the lease in event it is desired to utilize the land or any part thereof for reclamation works, or in event the work of reclamation is found to be hindered or delayed by reason thereof; and should be limited to one year, but may contain provision for renewal for the succeeding year in event the lands should not sooner be needed for reclamation purposes.....	526
<b>GENERALLY.</b>		Under the desert-land act as modified by the act of June 27, 1906, final proof upon a desert entry within a reclamation project can not be held to have been made and completed until the payments required by said acts and the act of June 17, 1902, have been made; and the Department is without authority to accept or regard final proof in such cases as complete, or to issue patent thereon, until after full compliance with the terms of payment imposed by the reclamation act....	519
Instructions under acts of June 11, 23, and 25, 1910.....	202	Where, however, the parties in interest are able to negotiate loans for amounts sufficient to pay the entire reclamation charges upon any entry, contingent upon the prompt issuance of final certificate and patent, consideration of the final proof and issuance of final certificate and patent, in cases otherwise regular, may be expedited.....	519
Regulations of June 27, 1910, governing appeals from the action of field officers in reclamation matters.....	51	A desert entryman whose land is included within a reclamation project may elect to proceed with the reclamation thereof on his own account, and thus acquire title to all, or so much of, the land included within his entry as he can secure water to irrigate, or accept the conditions of the reclamation act and acquire title thereunder to 160 acres; but he can not avail himself of both the reclamation project and other means of reclamation and thus acquire title to more than 160 acres of land.....	380
Paragraphs 19 and 20 of circular of May 31, 1910, respecting contests against entries embraced in reclamation withdrawals, amended.....	296		
Circular of October 3, 1910, under act of June 25, 1910, governing applications for leave of absence from reclamation homesteads.....	278		
Order of January 24, 1911, relating to payments of charges in Belle Fourche project.....	531		
Order of March 27, 1911, concerning payments under Lower Yellowstone project..	612		
Order of December 27, 1910, relating to high-land areas in Minidoka project.....	528		
Public notice of January 23, 1911, as to operation and maintenance charges in Minidoka project.....	528		
Orders of March 18, 24, and 31, 1911, relating to charges, water-supply, etc., in Minidoka project.....	529, 530, 531		
Order of March 24, 1911, concerning payments under North Platte project.....	606		
Order of March 28, 1911, concerning payments under Okanogan project.....	613		
Orders of February 6 and March 25, 1911, relating to water-supply, payment, etc., in Shoshone project.....	537, 538		
Order of March 28, 1911, concerning payments under Sun River project.....	614		
Appeals from the action of a project engineer lie in the first instance to the Director of the Reclamation Service, with			

ENTRY.	Page.
Circular of December 17, 1910, governing assignment of reclamation entries under act of June 23, 1910.....	421
Where a homestead entry within a reclamation project is divided into farm units, the entryman is entitled to retain only one of such units, to be designated by him; and as to the remaining units the entry must be canceled, or, where satisfactory final proof has been submitted, assignment thereof may be made under the provisions of the act of June 23, 1910.....	297
Where farm units have been established within a reclamation project, they become the smallest legal subdivisions subject to disposition, and assignments of lands within the project under the act of June 23, 1910, can thereafter be made only in accordance with such subdivisions.....	297
To entitle one to take by assignment under the act of June 23, 1910, he must show that he has not acquired title to and is not claiming any other farm unit or entry under the reclamation act.....	297
A married woman may, under the act of June 23, 1910, take an assignment of a homestead entry made under the reclamation act, upon which satisfactory final proof has been made, showing residence and cultivation for the required time, but upon which not all of the water-right charges have been paid, provided the laws of the State or Territory in which the entry is located permit a married woman to purchase and hold real estate as a <i>femme sole</i> ; but she will be required to show, in addition to the usual requirements in such cases, that the purchase is made with her own separate money, in which her husband has no interest or claim; that the assignment is not taken for the use or benefit of her husband, and that she has no agreement or understanding by which any interest therein will inure to his benefit; and that the water right thus sought by assignment, together with such other water rights as may be already held in possession by such assignee, will not aggregate water rights for more than 160 acres of land, furnished under the reclamation act.....	504
A homestead entry of land within a reclamation project, allowed subsequently to the act of June 25, 1910, upon an application in all respects regular filed prior to that act, and upon which action was delayed only because of pressure of business in the local office, is not in violation of the provisions of section 5 of said act.....	432
Where a portion of a homestead entry made subject to the provisions of the reclamation act is subsequently eliminated from the project, and the portion remaining within the project is designated as a	

	Page.
farm unit, the entryman may retain either the farm unit or the portion lying without the limits of the project, at his election, and the entry will be canceled as to the remainder.....	502
In view of the equities in this particular case, direction is given that if the entryman so desires the portion of the entry eliminated from the project may be again brought thereunder and added to the farm unit with a view to permitting him to complete entry for the entire tract.....	502

## WATER RIGHT.

Forms for water-right applications.....	532
Forms for water-right certificates and final affidavits.....	197
No deduction from the irrigable area subject to water charges will be made on account of easements for highways or irrigating ditches.....	2
The regulations of November 1, 1907, with respect to water rights in the Truckee-Carson reclamation project, did not take effect until January 1, 1908, and a water-right application filed in the meantime is subject to the regulations of May 6, 1907.....	580
An applicant for water rights under a reclamation project is required to pay for water for the entire irrigable area of his entry as shown on the plat upon which the construction charges were apportioned; and where mistake in the plat is alleged as to the irrigable area of the entry application for correction thereof should be made to the local officer of the Reclamation Service.....	2
Upon the issuance of a water-right certificate the right evidenced thereby becomes appurtenant to the land, subject to forfeiture for failure to pay the annual instalments at the time and in the manner prescribed by law and the regulations, and a subsequent purchaser of the land succeeds to the rights and status of the original owner, subject to the same charges and conditions.....	580
Applications for water rights under the reclamation act by individual lot owners for lands which have been subdivided into town lots will not be allowed; but water may be supplied to towns from reclamation projects by delivery to some convenient point, to be handled and distributed to the inhabitants of the town by the municipal authorities in accordance with the provisions of the act of April 16, 1906.....	591
Where after application for water right for the irrigable area of a farm unit, under the terms and for the acreage fixed in the published notice, a second notice is given showing an increased irrigable area in the farm unit and fixing a different rate per acre, the applicant is entitled to complete	

	Page.		Page.
payment for the area originally fixed at the rate specified in the first notice, but as to water right for the additional irrigable acreage shown by the second notice, he will be required to pay at the rate fixed in the latter notice.....	351	upon subsequently showing proper compliance with law, he may have the money paid in connection with his first application to commute credited upon a second such application.....	152
<b>Relation.</b>		Lands in the Devils Lake Indian reservation, opened to entry under the act of April 27, 1904, at \$4.50 per acre, which at the date of the proclamation of June 8, 1907, reducing the price of the remainder of said lands then unreserved and undisposed of to \$2.50 per acre, were embraced in an Indian allotment of record, or were in a state of reservation by virtue of the act of April 23, 1904, reserving lands for a period of sixty days after cancellation of an allotment-covering the same, did not fall within the purview of the proclamation; and a subsequent entryman of the land was properly required to pay at the original rate of \$4.50 per acre, and is not entitled to repayment of the difference between the two rates as excess.....	434
The doctrine of relation can not be invoked to the disadvantage of intervening adverse claims, nor to permit anyone to secure more land by indirect means than may be done directly.....	460	<b>Reservation.</b>	
<b>Repayment.</b>		See <i>Right of Way</i> .	
Circulars of July 23, 1910, under acts of June 16, 1880, and March 26, 1908.....	141, 146	<b>MILITARY.</b>	
Where a homestead entry is allowed subject to adjustment to a farm unit, when established, under the reclamation act, the entryman is entitled, upon such adjustment, to repayment of the fees and commissions paid on the land entered in excess of that finally allowed him.....	90	Instructions of July 19, 1910, governing sale of Camp Bowie lands.....	124
An entry in good faith relinquished because in conflict with a prior settlement right was "canceled for conflict" within the meaning of section 2 of the act of June 16, 1880, notwithstanding there was no contest to determine the conflicting rights, and the entryman is entitled to repayment of the moneys paid in connection therewith.....	477	Instructions of July 31, 1910, governing sale of Fort Davis lands.....	138
Mere error of judgment on the part of a timber and stone applicant in swearing that the land applied for is more valuable for timber than for agricultural purposes and is unoccupied, no bad faith or attempt at fraud appearing, is not sufficient ground for refusing repayment of the purchase money under the act of March 26, 1908, upon rejection of the application by the Department based upon a finding that the land is agricultural in character.....	191	Instructions of November 28, 1910, governing sale of Fort McKinney lands..	368
An entry canceled for failure to comply with law or upon voluntary relinquishment can not be considered as rejected within the meaning of the act of March 26, 1908, but where an entry void <i>ab initio</i> is canceled upon relinquishment filed in response to a rule to show cause why it should not be canceled, it may properly be considered as a rejected entry within the meaning of that act and repayment allowed if no fraud or attempted fraud in connection therewith is found.....	495	<b>FOREST LANDS.</b>	
Where the cash certificate issued upon commutation proof is canceled and the proof rejected, on the ground that the entryman had not sufficiently complied with law to entitle him to commute, and the entry is permitted to remain intact subject to future compliance with law, the entryman is not entitled to repayment of the commutation purchase money paid upon his entry; and the only relief to which he is lawfully entitled is that,		<i>Generally.</i>	
		Instructions of December 31, 1910, relative to notices to forest officers of applications to make final proof.....	436
		Instructions with respect to notice of filing of township plat covering lands in national forests.....	446
		Regulations of September 12, 1910, respecting notice of proceedings and decisions in cases involving lands or claims in national forests.....	200
		Circulars of June 27 and November 25, 1910, governing hearings and appeals in cases involving lands or claims in national forests.....	52, 374
		Instructions of March 31, 1911, under act of March 3, 1911, concerning homestead entries within forest withdrawals..	618
		Directions given that publication of notices of restoration to settlement and entry of lands temporarily withdrawn with a view to possible inclusion in a national forest be reduced to a period of four successive weeks.....	386
		Lands temporarily withdrawn with a view to inclusion in a national forest are not subject to entry under the provisions of the act of June 11, 1906.....	92
		Lands temporarily withdrawn from entry for further examination with a view to their inclusion in a definite forest reser-	



Page.  
 vation constitute "temporary forest reserves" within the meaning of section 1 of the act of June 11, 1906..... 411

The principle announced in the opinion of Acting Attorney General Fowler (28 Op. A. G., 424; 39 L. D., 411), that lands withdrawn from entry with a view to their inclusion in a national forest constitute a "temporary forest reserve" within the meaning of the act of June 11, 1906, concurred in..... 414

A homestead entry allowed subsequent to temporary withdrawal of the land with a view to possible inclusion in a national forest, based upon a valid settlement right initiated prior to survey and subsisting at the date of such withdrawal, excepts the land from a later proclamation including the land within a national forest, notwithstanding more than three months from the filing of the township plat had elapsed at the time the entry was made..... 279

Lands within a national forest listed under the act of June 11, 1906, as subject to homestead entry, may be appropriated only under that act; and the fact that they are also embraced within a larger area designated as of the class subject to entry under the enlarged homestead act of February 19, 1909, does not render them subject to disposition under said act..... 604

Section 2 of the act of March 3, 1911, protecting the preference rights of successful contestants where the lands embraced in the contested entries have been included in national forest withdrawals, applies to all contests initiated under the act of May 14, 1880, prior to the withdrawal, where cancellation of the entry results therefrom, regardless of whether cancellation was procured prior or subsequent to the withdrawal..... 611

Where unsurveyed land selected by the Northern Pacific Railway Company under the act of March 2, 1899, is found upon survey to be in excess of the base assigned to support the same, the company will not be permitted, in the face of an intervening adverse claim, to supply new base to equal the selection, but is restricted to the amount of land to which it is entitled upon the base assigned..... 229

Selections by the Northern Pacific Railway Company under the act of March 2, 1899, proffered subsequent to the application of the State for survey of the lands under the act of August 18, 1894, and while the lands were reserved from appropriation adverse to the State, are not, upon rejection of the subsequent application by the State, entitled to recognition as of the date of presentation, to the prejudice of the rights of settlers..... 583

Opinion of Attorney-General to the effect that no such preference right was acquired by the State of Idaho by its ap-

Page.  
 plication for survey of lands under the act of August 18, 1894, as prevented inclusion of the lands in the Sawtooth, now Boise, national forest..... 482

*Act of June 4, 1897.*

Land actually in use as a public cemetery is not "vacant" within the meaning of the act of June 4, 1897, and is not subject to selection under that act..... 383

The Land Department will not lend its agency to permit the Government to become receiver of lands as base for forest lieu selection where it has knowledge that title thereto was obtained by fraud..... 608

Where land assigned as base for a forest lieu selection was secured from the State by use of an application and purchased in the name of a fictitious person, the various instruments effecting the transfer of title from the State to the ultimate owner of the base land resting upon forged and fictitious papers, a selection based thereon must be canceled, whether the selector or subsequent grantee of the base land had knowledge of the fraud or not.. 426

Where the base land was acquired by means of an application and purchase by a real person, but not in his own interest but for the use and benefit of the party acquiring the title to the base land, in violation of the laws of the State regulating the sale of its lands, a selection based thereon should likewise be canceled, where the patentee of the State or his grantee does not occupy the position of a *bona fide* purchaser for value; otherwise it should be patented..... 426

An assignee of a contract to purchase land from the State of California, who acquires title from the State under the contract by patent in due form after full payment, has good title, if he in no way participated in, connived at, or had knowledge of fraud in the purchase from the State; and it is no objection to acceptance of such title as basis for lieu selection under the act of June 4, 1897, that the contract of purchase may have been procured from the State through fraud..... 76

The validity of a forest lieu selection under the act of June 4, 1897, does not depend upon whether the United States acquired a good title to the base land which it can successfully defend as a *bona fide* purchaser, but whether the selection was made in good faith and not by fraudulent practices and in pursuance of unlawful designs; and the Department will not, upon petition for certiorari, control the action of the General Land Office in ordering a hearing to determine whether the selector acquired title to the base land by fraudulent means for the purpose of selecting other lands in lieu thereof..... 64

Under the exchange provisions of the act of June 4, 1897, the selection of lands in lieu of other lands within a forest reserve relinquished to the United States with a view to such selection, can only be made by or in behalf of the owner of the lands relinquished; and one claiming to be an innocent purchaser of the selected land or the right of selection will not be recognized as entitled to obtain any right superior to that of the owner of the relinquished land. 607

## Reservoirs.

See *Right of Way*.

## Residence.

Instructions of February 21, 1911, under act of February 13, 1911, extending the time for certain homesteaders to establish residence. 506

Credit for residence will not be allowed during the time the land is not subject to entry by the person maintaining the residence. 230

A homestead entryman within the provisions of the joint resolution of February 2, 1907, who establishes residence within the extended period fixed thereby, although after the expiration of six months from the date of entry, is entitled, on commutation of his entry, to credit for constructive residence for a period of six months. 9

The legal residence of a wife is presumed to be that of her husband, and where both husband and wife at the time of marriage have an unperfected homestead entry, they can not thereafter maintain separate residences upon and perfect both entries; but where at the time of marriage the wife only has an unperfected homestead entry, and thereafter continues to reside thereon and otherwise comply with law, she is entitled to perfect the entry, notwithstanding her husband in the meantime is maintaining a separate residence upon his own patented homestead entry to which he had perfected title prior to their marriage. 593

## Right of Way.

### GENERALLY.

Opinion of Attorney General respecting institution and prosecution of right-of-way forfeiture proceedings in name of United States. 481

Directions given that proceedings in the name of the United States, at the instance of a petitioner, to secure judicial declaration of forfeiture of rights of way for non-performance of conditions subsequent, under the regulations of January 6, 1906, be instituted and prosecuted by United States District Attorneys, and that indemnifying bonds to cover costs, required by such regulations, be dispensed with. 480

## RAILROAD.

Page.

No deduction in acreage or payments will be made in entries of Fond du Lac Indian lands traversed by the Northern Pacific Railroad Company's right of way because of the area embraced in such right of way. 565

The provision in section 4 of the act of March 2, 1899, that rights of way granted by that act "shall be deemed forfeited and abandoned *ipso facto*" as to portions of the road not constructed and in operation as required by the act, is not effective to work a forfeiture of the grant until there has been due ascertainment and declaration of forfeiture by proper authority; and at any time prior to such ascertainment the Secretary of the Interior may extend the time for completion of the road, under authority of the proviso to said section. 44

Instructions of January 29, 1910, requiring applicants for railroad rights of way over public lands upon which are possible power sites to file, as a prerequisite to approval thereof, a stipulation that applicant will, upon proper request, elevate or move its tracks and roadbed in event of withdrawal for power purposes of any portion of the public lands over which the right of way passes, vacated and annulled. 89

Where an application for railroad right of way covers public lands upon which are possible power sites, examination should be had by the land department, before acting upon the application, to determine whether the lands may be utilized to the best advantage for power sites or other power purposes; and if it appear that the public good resultant from withholding the land for power development is disproportionate to the benefits to be derived from construction of the railroad, the application should be approved, even though it might interfere with development of the power; but if, on the other hand, the power possibilities are sufficient to justify utilization of the public lands for such purposes, to the exclusion of other uses which may conflict, the lands should be withdrawn and the application rejected, unless the line of road can be so located as not to interfere or conflict with the use of the land for power purposes. 86

Under the rule laid down in departmental decision in Continental Tunnel Railway Company (39 L. D., 86), the power-site stipulation set forth in the regulations of January 29, 1910 (38 L. D., 405), will no longer be required of applicants for right of way; but where an application accompanied by such stipulation has been approved, without a preliminary investigation having been made, the stipulation will not be canceled or surrendered unless the company will relinquish all rights it may have acquired under the approval, to the end that it may be determined

	Page.
whether the right of way is so situated with reference to water courses susceptible of power development as to require the withdrawal of the land involved for power purposes, and whether use of the land is essential to development of the power . . .	209
Under authority conferred upon the Secretary of the Interior by the act of March 2, 1899, to make all needful rules and regulations for the proper execution and carrying into effect of the provisions of that act, the department has the right to make reasonable requirements of an applicant for right of way under the act, such as requiring a stipulation that it will keep the right of way free from inflammable materials, will take precautions against fire, pay damages caused by fire, permit the United States to cross the right of way with telegraph and telephone lines, roadways, ditches, canals, etc. . . .	174
Where right of way over lands in an Indian reservation is sought under the act of March 2, 1899, examination should be made to ascertain whether the lands over which the right of way passes are so situated with reference to water courses susceptible of power development as to justify use of the land for power purposes, and if use for such purpose be found necessary, it should be ascertained whether the right of way as located, both as to alignment and grade, will interfere with development of power; and, if so, applicant should be advised and required to change its line, provided it can be so located as not to interfere with use of the land for power purposes; and in case the lands have been withdrawn for power purposes appropriate recommendation made to the President, to the end that the application be approved; and should applicant refuse to make such change the application should be rejected. . . .	175
<b>CANALS, DITCHES, AND RESERVOIRS.</b>	
The extent of the grant made by the act of March 3, 1891, is defined by the statute, and the Secretary of the Interior is not authorized to accord a qualified approval of applications filed thereunder for the purpose of limiting the estate thereby granted. . . .	104
Rights of way for reservoir sites under the act of March 3, 1891, may be acquired by actual occupancy and development on the ground; and a mere application and map, unless followed with reasonable diligence by actual development and use, is no bar to appropriation of the site by another who proceeds with diligence to development and utilization thereof. . . .	27
Where the Government has filed notice of appropriation and asserted its claim to the unappropriated waters of a stream, applications for rights of way in conflict	

	Page.
with or detrimental to the government project, when such rights are based upon appropriations made, or use attempted to be initiated, subsequent to the assertion of the claim of the Government, should not be allowed. . . .	334
Approvals of applications for right of way under the act of March 3, 1891, as amended by the act of May 11, 1898, for primary purposes of irrigation, are subject to all valid existing rights and upon the express condition that the right of way he used for the main purpose of irrigation; that any electrical power or energy developed thereunder is to be primarily used for the purpose of irrigation; and any abandonment or violation of such use, or neglect to comply with the provisions of the law, will work a forfeiture which will be enforced by appropriate proceedings. . . .	309
Whether the United States has a prior, superior, and paramount claim to waters of the Rio Grande to the extent necessary to enable it to keep its treaty obligations with the Republic of Mexico with reference to the delivery of such waters is a question not within the competency of the Land Department to determine, and the Secretary of the Interior will not embarrass the decision of such question, nor the fulfilment of the nation's obligations under such treaty, by approving applications for rights of way under the act of March 3, 1891, which rest upon the appropriation of such waters under state laws and their proposed diversion to other and adverse uses. . . .	104
<b>School Land.</b>	
No title is acquired under or by virtue of a school indemnity selection until the same has been duly approved and certified, and prior thereto a disclosure that the land is mineral will defeat the selection. . . .	491
The State will in all cases be required to file a certificate of nonsale and nonencumbrance of land designated as base for school indemnity selections, regardless of whether the land has or has not been surveyed. . . .	174
Where a State makes indemnity selection in lieu of school sections returned as mineral at the time of survey, and is unable to establish the mineral character of the base lands, it should be permitted, inasmuch as the selections were <i>prima facie</i> valid when made, to assign other valid bases to support the selections, notwithstanding the selected lands may have since been included within a national forest. . . .	159
By acquiescing in departmental decision in the case of Homestead and Timber Land Claimants <i>v.</i> State of Washington, 36 L. D., 89, the adjudication therein	

	Page.		Page.
against the claim of the State under its selection and in favor of the prior settlers became final and fixed, and the State thereafter had no right by virtue of its selection that would attach upon relinquishment of the settlement claim; but the land thereupon became subject to appropriation by the first legal applicant.	473	ter of right insist that a location made under good and sufficient powers shall be approved in opposition to the wish of the scripsee, as every act of the attorney under such powers must be for the use and benefit of the scripsee.....	555
A homestead application tendered while the land applied for was embraced in a <i>prima facie</i> valid school indemnity selection, accompanied by a protest against the selection on the ground of insufficient base, does not present such an adverse claim as will prevent substitution by the State, in a proper case, of a good and sufficient base, where the defect charged in the protest was shown by the records of the General Land Office and action on that ground instituted against the State's claim before any cognizance of the protest was taken by that office....	377	<b>Selection.</b>	
Where a State selection proffered during the preference right period accorded the State within which to make selection was held for rejection as to a certain tract for conflict with a homestead entry based upon settlement prior to survey, and while the selection list embracing the tract was still pending the entryman relinquished his entry and filed application for the land under the timber and stone act, the State's selection will be held superior to the timber and stone application, where it is apparent the entryman's settlement and entry were not in good faith to acquire a home, but merely for the purpose of defeating the State's preference right of selection and then relinquishing the entry and acquiring title to the land under some other law.....	390	See <i>Railroad Grant; Reservation; School Land; States and Territories.</i>	
		Regulations of June 23, 1910, governing selections of lands by States and Territories under grants for educational and other purposes.....	39
<b>Scrip.</b>		<b>Settlement.</b>	
Ware scrip may be located only upon surveyed land.....	417	A settlement upon land not subject thereto may not be imputed as an authorized settlement upon an adjoining legal subdivision within a different technical quarter-section, as against an intervening adverse claim lawfully initiated.....	371
Double minimum lands are subject to location with Sioux half-breed scrip only upon payment of the difference between the single and double minimum price....	446	One asserting prior settlement as against an application to enter, suspended because of the closing of the local office, must, in order to maintain his alleged claim, continue residence upon the land pending determination of the question of superior right.....	348
One of several heirs to a Sioux half-breed scrip right has no authority to locate the same without the consent and authority of the owners of the other interests....	538	While a settler upon unsurveyed public land must assert his claim within three months after the filing of the township plat of survey or forfeit the same to the next settler in order of time who shall comply with the provisions of the law, failure to assert his claim within such time does not result in forfeiture thereof in favor of the claim of the State under its school grant.....	282
In view of the statutory inhibition against the transfer or conveyance of Sioux half-breed scrip, there can be no valid power to locate such scrip coupled with an interest.....	554	<b>Settlers.</b>	
At any time before location and sale of the land the scripsee may revoke a power of attorney given by him to locate Sioux half-breed scrip, whether the attorney in fact has notice of the revocation or not; and while the land department may, for good and sufficient reasons, refuse to allow the scripsee to change or abandon a location, the attorney in fact can not as a mat-		See <i>Railroad Lands.</i>	
		<b>Special Agent.</b>	
		Manner of proceeding on special agents' reports.....	458
		<b>States and Territories.</b>	
		See <i>School Land.</i>	
		Regulations of June 23, 1910, governing selections under grants for educational and other purposes.....	39
		Instructions of August 2, 1910, under act of June 25, 1910, making a grant of lands to Colorado for benefit of agricultural college.....	140
		The provision in the act of March 3, 1893, according to the State of Idaho a preference right for a period of sixty days from the filing of the township plat of survey within which to select lands subject to entry by the State under the act of July 3, 1890, is not effective as against the United States and will not prevent the Government including the lands in a national forest.....	343
		A selection for university purposes by the State of Idaho within the sixty-day	

preference right period accorded it by the act of August 18, 1894, in excess of the unsatisfied portion of its grant for such purpose, may be for that reason rejected in its entirety; and the State is not entitled to transfer the excess to the satisfaction of other grants, to the prejudice of the rights of settlers.....	583
For the purpose of determining whether certain islands lying between the two channels of the Sabine River at a point known as the "Narrows" are part of the public domain and of the character of lands that pass to the State of Louisiana under its swamp land grant, the west bank of the western channel of the river at this point will be recognized as the boundary between the States of Louisiana and Texas.....	53

## Statutes.

See *Acts of Congress and Revised Statutes cited and construed*, pages XX and XXII.

The land department is without authority to pass upon the constitutionality of a statute, that question being within the province of the courts; and in the absence of a final decision by the courts holding unconstitutional an act dealing with public lands, the land department must proceed with the administration thereof.....

449

## Survey.

No preference right of selection inures to the State by virtue of an application for survey of lands under the act of August 18, 1894, where the State fails to publish notice of the application as required by the act.....

343

Where an application for survey by the State under the act of August 18, 1894, was addressed to the surveyor-general for the State and the Commissioner of the General Land Office and filed with the surveyor-general and by him transmitted to the Commissioner, the published notice of such application will not be held defective merely because publication thereof commenced prior to receipt of the application by the Commissioner.....

471

While the act of July 1, 1902, providing for the resurvey of certain townships in Imperial Valley, California, contemplates that the lands occupied by settlers and described according to private surveys should be recognized and marked by an official survey, it does not contemplate a departure from the established system governing the surveys of public lands or recognize any irregularity of survey, and where conflicts are unavoidable the lines of the different claims should be so adjusted as to produce the least inequality between the several claims.....

583

## Swamp Land.

See *States and Territories*.

## Timber and Stone Act.

See *Contest*.

The timber and stone act of June 3, 1878, which fixes merely the minimum price at which lands are to be sold thereunder, sufficiently warrants appraisal and sale of lands thereunder at a higher rate.....

449

Land upon which there is a growth of timber useful for mining purposes and so located with reference to mines as to give it a value for such purposes greater than its value for agricultural purposes is timber land within the meaning of the act of June 3, 1878, and subject to entry under that act.....

577

The fee required to be paid at the time of the presentation of a timber and stone sworn statement should be returned to the applicant in all cases where for any reason other than fraud the local officers reject such sworn statement at the time of its presentation or at any time prior to the submission of proof in pursuance of the published notice.....

573

The allowance of an application to contest a timber and stone entry is within the discretion of the Commissioner of the General Land Office, and not a matter of right granted by law; and where the applicant seeks to contest such an entry on the ground of underappraisal of the land, the Commissioner may, in his discretion, reject the application and direct a reappraisal.....

433

The fact that an applicant under the timber and stone act, subsequent to the regulations of November 30, 1908, is a successful contestant and makes application in exercise of the preference right resulting from a contest initiated prior to such regulations, does not entitle him to purchase at the minimum rate of \$2.50 per acre, but he will be required to pay the appraised value of the land.....

379

The character of land embraced in a timber and stone entry is judicable by smallest legal subdivisions; and where at any time prior to patent, notwithstanding payment may have been made and accepted and certificate issued for the entire tract applied for, a legal subdivision is found to be not of a character subject to disposition under that act, the certificate should be to that extent canceled.....

359

After full payment of the purchase price and the issuance of final certificate upon a timber and stone entry, the land department is without jurisdiction over the land except to determine whether it was subject to such entry at the date thereof and whether the entryman was qualified to make the entry and had in

all respects complied with the law; and subsequent withdrawal of the land in anticipation of proposed legislation affecting the disposition of power sites is unauthorized and not sufficient ground for withholding patent upon the final certificate.....	Page. 201			Page. 356
<b>Timber Cutting.</b>				
A foreign corporation, although doing business solely within the State of Idaho, and having complied with the requirements of the state statutes, is not a resident of the State within the meaning of the act of June 3, 1878, authorizing <i>bona fide</i> "residents" of the States and Territories therein named to cut timber for certain purposes from the public mineral lands.....	80			
<b>Town Lot.</b>				
Under the provisions of section 17 of the act of June 21, 1906, a married woman, a <i>bona fide</i> resident, is entitled to enter an "additional lot" of which she was in possession and upon which she had substantial and permanent improvements, notwithstanding her husband may have theretofore made entry of both a residence and an additional lot.....	516			
<b>Township Plat.</b>				
Instructions with respect to notice of filing of township plat for lands in national forests.....	446			
<b>Town Site.</b>				
See <i>Right of Way</i> .				
In order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain mineral, when the town-site patent takes effect, but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them.....	356			
Title based upon a patent, presumptively complete, issued on a town-site entry, and remaining unchallenged for many years, should not be disturbed, in favor of a lode mining applicant, except upon the clearest proof that the conflicting area was known, at the date of the patented entry, to occupy such a status, or possess such a character, that complete title thereto can not be held to have passed thereunder.....				
No patent should be issued or entry allowed for any lode within the exterior limits of a patented town site in the absence of a determination, as the result of a hearing had in a proceeding to which those claiming under the town-site patent are parties, that such lode was known to exist at the time of the filing of the town-site application.....				356
<b>Water Right.</b>				
See <i>Reclamation</i> .				
<b>Withdrawal.</b>				
See <i>Coal Lands; Reservation</i> , sub-title <i>Forest; Right of Way</i> , sub-title <i>Railroad</i> .				
Instructions of March 6, 1911, under act of June 25, 1910, authorizing the President to make temporary withdrawals.....				644
<b>Witnesses.</b>				
Instructions of March 22, 1911, concerning compulsory attendance of witnesses.....				601
<b>Words and Phrases Construed.</b>				
"Gravel" in nonmineral homestead affidavit means gravel bearing gold or other valuable metallic substance.....				313
"Agricultural lands" in act of July 2, 1864.....				314
"Own and occupy" in Kinkaid act....				16
"Permanent forest reserves" in act of June 11, 1906.....				411, 414
"Temporary forest reserves" in act of June 11, 1906.....				411, 414
"Resident" in act of June 3, 1878, authorizing cutting of timber, does not include a foreign corporation.....				80